state tax." App., *infra*, at 14a (emphases added). In other words, although the Minnesota Supreme Court recognized that a state tax ordinarily violates the dormant Commerce Clause when it provides an exemption to a taxpayer for in-state but not out-of-state sales, it read *Kidd* and *Darnell* as authorizing a State to tax out-of-state activity more heavily if it accomplishes that goal by making the exemption for in-state sales dependent on the actions of a third party. *Id.* The Minnesota Supreme Court therefore concluded that the MinnesotaCare tax does not facially discriminate against interstate commerce because its exemption for revenues from in-state sales is predicated upon *a third party's* tax payments—*i.e.*, the MinnesotaCare tax payments made by Mayo's customers. *Id.*

The Minnesota Supreme Court also concluded that the MinnesotaCare tax is internally consistent and thus fairly apportioned. App., *infra*, at 30a. That conclusion was based on a novel construction of a statutory provision that grants a tax credit to any customer who "has *paid taxes* to another jurisdiction measured by gross revenues and is subject to [the MinnesotaCare tax] on the *same gross revenues*." Minn. Stat. § 295.54 subd. 1 (emphases added). The Minnesota Supreme Court construed this provision as making available a tax refund to Mayo's out-of-state customers.[6] App., *infra*, at 26a-27a. The court theorized that this refund would enable out-of-state customers who resell Mayo's services and who are taxed on those proceeds by their own State to pass through only one gross receipts tax to their patients, thereby ensuring that, ultimately, both out-of-state and in-state transactions are taxed by only one jurisdiction. *Id.* at 30a. In the

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[6] Not even the Minnesota Department of Revenue appears to endorse the Minnesota Supreme Court's interpretation of the credit provision, as the Department has failed to provide forms—or any other mechanism—for out-of-state health-care institutions to claim a refund when the MinnesotaCare tax is passed through to them by Minnesota providers.

court's view, its construction of the tax credit provision saved the statute from a fair apportionment challenge.[7]

4. Mayo filed a petition for rehearing with the Minnesota Supreme Court. The petition demonstrated that in *Fulton Corp. v. Faulkner*, 516 U.S. 325, this Court explicitly repudiated *Kidd* and *Darnell* as Commerce Clause precedents (*id.* at 346), and that the Minnesota Supreme Court's reliance upon those decisions was thus grossly misplaced. The Minnesota Supreme Court nonetheless denied Mayo's petition for rehearing but amended its opinion to include a footnote acknowledging that *Kidd* and *Darnell* "are no longer good law under the Commerce Clause" and yet opining that these decisions "remain relevant when, as here, a taxpayer's claim that a tax is facially discriminatory is premised on a third party's tax burden." App., *infra*, at 52a-53a.

REASONS FOR GRANTING THE PETITION

The decision below presents a question of exceptional importance. Relying on this Court's decisions in *Kidd v. Alabama*, 188 U.S. 730 (1903), and *Darnell v. Indiana*, 226 U.S. 390 (1912), the Supreme Court of Minnesota sustained against a dormant Commerce Clause challenge a Minnesota health-care tax that in operation always applies when Minnesota health-care providers sell services to customers in other States but that *never* applies when services are sold to in-state customers. That decision flies in the face of this Court's

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[7] Mayo argued below that the MinnesotaCare tax is invalid on both facial discrimination and fair apportionment grounds. Because the Minnesota Supreme Court's novel (and textually insupportable) construction of the MinnesotaCare tax's credit provision turns on issues of state law, App., *infra*, at 25a-30a, this petition focuses exclusively on the facial discrimination issue. The Minnesota Supreme Court's interpretation of the tax credit provision has no bearing on the facial discrimination question and does nothing to alter the fact that Mayo always pays the tax when it sells to out-of-state customers but never pays the tax when it sells in state to Minnesota health-care providers and hospitals.

cases addressing the constitutionality of state tax schemes under the dormant Commerce Clause and warrants further review.

This Court has effectuated the dormant Commerce Clause's free-trade objectives by consistently invalidating state taxes that include exemption or credit provisions that facially discriminate against interstate commerce. Indeed, this Court has "*never* upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of *in-state* taxes but failed to extend such credit to payment of equivalent *out-of-state* taxes." *Jefferson Lines, Inc.*, 514 U.S. at 192 n.6 (emphases added).

Yet although it is firmly established that a State may not grant an exemption based upon a taxpayer's payment of an in-state tax without also providing a parallel exemption predicated upon the taxpayer's payment of a comparable out-of-state tax, in *Jefferson Lines* this Court expressly reserved the question whether this nondiscrimination requirement extends to exemptions that are premised upon the tax payments of a third party (*e.g.*, a customer of the primary taxpayer). *See* 514 U.S. at 192 n.6 ("We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party."). As the Supreme Court of Minnesota expressly recognized, this case squarely presents that question.

Before the decision below, the "third-party payment" question left open by *Jefferson Lines* had been addressed by several state supreme courts, all of which concluded that the *Kidd* and *Darnell* line of cases is a dead letter and that the dormant Commerce Clause *does* prohibit a State from granting a tax exemption that is based upon a third party's payment of an in-state tax but that does not extend to a third party's payment of a comparable out-of-state tax. That result is most assuredly correct because this Court has consistently emphasized that "'a State may not tax a transaction or inci-

dent more heavily when it crosses state lines than when it occurs entirely within the State.'" *Tyler Pipe Indus., Inc.*, 483 U.S. at 240-41 (quoting *Armco Inc.*, 467 U.S. at 642). There is no compelling doctrinal or policy reason to allow States to circumvent this rule through the simple artifice of conditioning tax exemptions on third-party conduct. Such a rule invariably would lead to a proliferation of tax exemptions, like the one included in the MinnesotaCare tax, that apply only to in-state transactions and affirmatively discourage interstate commerce. Indeed, the decision below has nationwide implications because several States have taxes that include third-party-based exemptions indistinguishable from the MinnesotaCare tax's exemption at issue here.

This Court should grant the petition for certiorari and provide a definitive answer to the recurring and significant question left unresolved in *Jefferson Lines*. The need for guidance is demonstrable. Although this Court has unequivocally and expressly declared that *Kidd* and *Darnell* "are no longer good law under the Commerce Clause," *Fulton Corp.*, 516 U.S. at 346, the Supreme Court of Minnesota nonetheless rested its decision squarely on those repudiated precedents. The court did so because, in its view, this Court's more recent Commerce Clause precedents do not conclusively address the question presented by this case. The confusion in this area is pervasive and shows no sign of abating. Review is both necessary and warranted.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS PROHIBITING STATE TAX SCHEMES FROM DISCRIMINATING AGAINST OUT-OF-STATE COMMERCE.

The dormant Commerce Clause mandates that States treat in-state and out-of-state transactions evenhandedly. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977). Because a State's justifications for its discrimi-

natory treatment of out-of-state commercial activity are subject to the "'strictest scrutiny,'" *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 101 (1994), "[s]tate laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Fulton Corp.*, 516 U.S. at 331 (internal quotation marks omitted). Indeed, the "State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Or. Waste Sys.*, 511 U.S. at 101 (internal quotation marks and citation omitted). Whether that "discrimination comes in the form of a deprivation of a generally available tax benefit"—such as a tax exemption—"rather than a specific penalty on the activity itself, is of no moment." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578-79 (1997). The dormant Commerce Clause prevents States from harnessing the machinery of state taxation systems to discriminate against out-of-state commerce in any form.

1. This Court has repeatedly applied the dormant Commerce Clause's nondiscrimination principle to invalidate state tax schemes that offer a taxpayer an exemption based upon the payment of an in-state tax but that do not also provide the taxpayer an exemption based upon the payment of an equivalent out-of-state tax.

In *Armco Inc. v. Hardesty*, 467 U.S. 638, for example, this Court invalidated a West Virginia tax scheme that imposed a gross receipts tax on wholesalers of tangible property but exempted companies that paid West Virginia's separate manufacturing tax. *Id.* at 640 n.3. The Court concluded that the West Virginia gross receipts tax facially discriminated against interstate commerce because it "provide[d] that two companies selling tangible property at wholesale in West Virginia [would] be treated differently depending on whether the taxpayer conduct[ed] manufacturing in the State or out of it." *Id.* at 642. Because only West Virginia manufacturers were entitled to the exemption from the State's gross receipts

tax, the tax ran afoul of the dormant Commerce Clause's nondiscrimination requirement. *Id.*

Similarly, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, this Court invalidated a Washington tax scheme that imposed a tax on manufacturing activities but provided an exemption for the portion of a manufacturer's output that was subject to a separate state wholesale tax. *Id.* at 236-37 & n.8. The Court held that the Washington tax exemption "affirmatively place[d] interstate commerce at a disadvantage" because it did not account for out-of-state manufacturers who paid a manufacturing tax to another State. *Id.* at 243. Those companies, the Court observed, would be required to pay both a manufacturing tax (to their home State) and a wholesale tax (to Washington), whereas Washington manufacturers who sold in state paid only the wholesale tax. *Id.* at 253. The Court also concluded that the manufacturing tax discriminated against in-state manufacturers who sold their products out of state because Washington manufacturers who sold in state earned an exemption from the manufacturing tax, whereas Washington manufacturers who sold out of state received no such exemption. *Id.* at 246. The Court explained that, to avoid this facial discrimination against interstate commerce, Washington would have to "provide[] a credit against Washington tax liability for wholesale taxes paid by local manufacturers to *any* State, not just Washington." *Id.* (emphasis added).

The facial discrimination against interstate commerce wrought by the statutes at issue in *Armco* and *Tyler Pipe* can be contrasted with the equal treatment of interstate commerce afforded by the state tax statutes upheld by this Court. In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), for example, this Court sustained against a dormant Commerce Clause challenge a tax that was levied upon all goods bought at retail, but provided an exemption where a sales tax had already been paid on the product. *Id.* at 580-81. Unlike the discriminatory taxes in *Armco* and *Tyler Pipe*—each of

which afforded exemptions based solely on the payment of in-state taxes—the Washington use tax's exemption was triggered by the payment of either in-state *or* out-of-state sales taxes. Citing this feature, the Court concluded that the use tax did not discriminate against interstate commerce because "[e]quality is the theme that runs through all the sections of the statute" and because "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." *Silas Mason Co.*, 300 U.S. at 583-84. Similarly, in *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944), the Court rejected a dormant Commerce Clause challenge to a state use tax that included an exemption premised upon the payment of either an in-state or out-of-state sales tax. *Id.* at 336-37.

This Court has recognized that the divergent results in *Armco* and *Tyler Pipe*, on the one hand, and *Silas Mason* and *General Trading Co.*, on the other, are attributable to the fact that the taxes invalidated in *Armco* and *Tyler Pipe* provided exemptions only for the payment of in-state taxes, while the taxes in *Silas Mason* and *General Trading Co.* provided an exemption based upon the payment of both in-state and out-of-state sales taxes.[8] *See Tyler Pipe Indus., Inc.*, 483 U.S. at 245. Relying upon these precedents in *Jefferson Lines*, this Court held that a State that levies a gross receipts tax upon interstate bus tickets and that provides a credit for the pay-

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[8] Legal commentators have made similar observations. *See* Walter Hellerstein et al., *Commerce Clause Restraints on State Taxation After* Jefferson Lines, 51 TAX L. REV. 47, 66 (1995) ("a [tax] credit limited only to in-state sales would run counter to numerous Supreme Court decisions"); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 432 (1996) ("the Court has repeatedly invalidated state tax provisions if they provide an in-state business or activity with protections or benefits that are not similarly available to its out-of-state competition").

ment of in-state sales tax must give equal treatment to interstate commerce "by granting a credit for sales taxes paid to *any* State." 514 U.S. at 192 n.6 (emphasis added). The Court made clear that

> [w]e have . . . *never* upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes. To the contrary, in upholding tax schemes providing credits for taxes paid in state and occasioned by the same transaction, we have often pointed to the concomitant credit provisions for taxes paid out of state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike. A general requirement of equal treatment is thus amply clear from our precedent.

Id. (emphasis added; citations omitted).

Because the issue was not squarely presented in the case, the Court in *Jefferson Lines* expressly declined to decide whether the nondiscriminatory treatment of interstate commerce required by cases such as *Armco* and *Tyler Pipe* extends to tax exemptions predicated upon third parties' tax payments. *See Jefferson Lines, Inc.*, 514 U.S. at 192 n.6 ("We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party."). As the Supreme Court of Minnesota recognized, that question is squarely presented by this case.

This Court's subsequent Commerce Clause cases strongly suggest that the dormant Commerce Clause does not draw an artificial distinction between exemptions based upon third parties' tax payments and exemptions based upon payments by the taxpayers themselves. In *Fulton Corp. v. Faulkner*, 516 U.S. 325, for example, this Court invalidated

North Carolina's "intangibles tax," which was assessed on the value of corporate stock owned by state residents, but which provided a tax deduction based upon the proportion of the issuing corporation's income that was subject to North Carolina taxation. 516 U.S. at 328. Under the tax, a 100% deduction was applied to the stock of a corporation that did all of its business in North Carolina, but no deduction was allowed for a corporation that did no business in North Carolina because none of its income was taxed by the State. *Id.*

This Court concluded that the intangibles tax was facially discriminatory because it provided an exemption that applied exclusively to the ownership of stock in companies that did business in North Carolina. *Fulton Corp.*, 516 U.S. at 333. No member of the unanimous *Fulton* Court questioned the propriety of applying the dormant Commerce Clause's nondiscrimination requirement to a tax deduction that was predicated upon the tax payments of a third party—*i.e.*, the North Carolina tax payments of the issuing corporation—rather than upon tax payments made by the stockholders themselves.

Similarly, in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), the Court invalidated a New York tax credit for parent corporations that was based upon the proportion of their subsidiaries' exporting activities that originated in New York. *Id.* at 393-94. The Court concluded that the tax credit unconstitutionally discriminated against out-of-state commerce by penalizing out-of-state export activity. *See id.* at 400-01. Notably, the parent companies' tax exemption was tied to the level of intrastate exporting activities in which their *subsidiaries* engaged, and not to the exporting activities of the parent companies themselves. *Westinghouse Elec. Corp.*, 466 U.S. at 393-94. The Court drew no distinction between tax exemptions based upon a third party's activities and those based upon the taxpayer's activities.

Like *Fulton*, *Westinghouse* strongly suggests that the dormant Commerce Clause does not condone the use of discriminatory third-party-based tax exemptions where such discrimination would be unconstitutional if premised directly upon the taxpayers' own payments.

2. The Minnesota Supreme Court's decision upholding the MinnesotaCare tax cannot be reconciled with the nondiscrimination principles that animated *Armco* and *Tyler Pipe* and their progeny. Just as West Virginia and Washington were found to have discriminated against interstate commerce by granting a tax exemption to in-state businesses, Minnesota is discriminating against interstate commerce by denying an exemption to Mayo for transactions with out-of-state customers who pay another State's equivalent gross receipts tax.

Indeed, the tax that this Court invalidated in *Tyler Pipe* provides an especially close analogy to the MinnesotaCare tax. Under that tax scheme, Washington manufacturers who sold in state were exempt from the manufacturing tax, whereas Washington manufacturers who sold to out-of-state customers were required to pay it. *Tyler Pipe Indus., Inc.*, 483 U.S. at 237 n.8. This Court concluded that "Washington's multiple activities exemption [is] invalid because it places a tax burden upon manufacturers in Washington engaged in interstate commerce from which local manufacturers selling locally are exempt." *Id.* at 253. The MinnesotaCare tax is indistinguishable because—to paraphrase the *Tyler Pipe* Court—it places a tax burden upon Minnesota medical laboratories engaged in interstate commerce from which Minnesota medical laboratories selling locally are exempt. Simply put, Mayo pays the MinnesotaCare tax when it con-

ducts interstate business but is exempt from the tax when doing business with in-state customers.[9]

The MinnesotaCare tax is also analogous to the tax invalidated in *Fulton*. Both the North Carolina intangibles tax and the MinnesotaCare tax offer an exemption based upon a third party's payment of an in-state—but not an out-of-state—tax. North Carolina's exemption, which was premised upon the issuing corporation's payment of North Carolina income tax, was unconstitutional because no comparable exemption was available where a corporation paid out-of-state income tax. *Fulton Corp.*, 516 U.S. at 333. Similarly, Minnesota provides a tax exemption where Mayo's customers pay the MinnesotaCare tax but offers no exemption where Mayo's customers pay an equivalent gross receipts tax to another State. Under *Fulton*'s reasoning, the MinnesotaCare tax facially discriminates against interstate commerce and therefore violates the dormant Commerce Clause.

In light of the well-established dormant Commerce Clause prohibition on exemptions that are based on the *taxpayer's* in-state—but not out-of-state—tax payments, there is no principled basis for concluding that the Clause permits a State to accomplish the same discrimination through the use of exemptions based upon a *third party's* tax payments. *See*

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[9] That the MinnesotaCare tax does not draw an explicit geographic distinction between in-state and out-of-state sales is irrelevant to the dormant Commerce Clause analysis because the practical effect of the tax's exemption provision is to require Mayo to pay the tax only when doing business with out-of-state customers. This Court has repeatedly invalidated statutes as facially discriminatory where those statutes did not expressly draw distinctions between in-state and out-of-state commerce. *See Complete Auto Transit, Inc.*, 430 U.S. at 279 (this Court "consider[s] not the formal language of the tax statute but rather its practical effect" when undertaking a dormant Commerce Clause inquiry); *Tyler Pipe Indus., Inc.*, 483 U.S. at 248 ("The fact that [a] . . . tax has the advantage of appearing nondiscriminatory does not save it from invalidation" as facially discriminatory) (internal quotation marks and citation omitted).

Westinghouse Elec. Corp., 466 U.S. at 405 (in the dormant Commerce Clause context, this Court has "declined to attach any constitutional significance to . . . formal distinctions that lack economic substance"). Indeed, the Minnesota Supreme Court appeared to acknowledge as much when it conceded that by "[e]xtrapolating [*Tyler Pipe*'s] reasoning to the MinnesotaCare tax, one could suggest that to avoid discrimination against interstate commerce, the Minnesota exemption should have been applied to gross revenues from a transaction that was subject to a separate gross revenue tax in any state, not just in Minnesota." App., *infra*, at 11a. The Minnesota Supreme Court recognized that *Armco* and *Tyler Pipe* "might be read to suggest that a tax exemption such as Minnesota's is facially discriminatory if applied to in-state sales but denied to out-of-state sales." *Id.* at 12a.

The Minnesota Supreme Court nevertheless sought to evade the obvious implications of this Court's decisions by relying upon a formalistic distinction between taxpayer-based exemptions and third-party-based exemptions. Although this Court in *Jefferson Lines* reserved ruling on whether the nondiscrimination principle applies to third-party-based tax exemptions, the Minnesota Supreme Court did not follow this Court's teaching in *Fulton* and *Westinghouse*, but instead relied on *Kidd v. Alabama*, 188 U.S. 730, which upheld an Alabama tax that was levied on residents' ownership of stock in out-of-state railroads but that did not apply to the stock of railroads subject to taxation in Alabama, *id.* at 731, and *Darnell v. Indiana*, 226 U.S. 390, which sustained an Indiana tax that applied to a resident's ownership of stock in all out-of-state companies but that provided an exemption for the ownership of stock in Indiana corporations that paid property tax to the State. *Id.* at 397.

As this Court subsequently recognized in *Fulton*, *Kidd* raised an *equal protection*—not a *dormant Commerce Clause*—challenge to the Alabama statute, and the standards for examining discriminatory taxation are less stringent under

equal protection analysis than under the dormant Commerce Clause. *See Fulton Corp.*, 516 U.S. at 345. And *Darnell* relies completely on *Kidd*. *See id.* The *Fulton* Court therefore concluded that, "while cases like *Kidd* and *Darnell* may still be authorities under the Equal Protection Clause, *they are no longer good law under the Commerce Clause.*" *Id.* at 346 (emphasis added).[10]

In light of *Fulton*'s express repudiation of *Kidd* and *Darnell* as Commerce Clause authorities, the Minnesota Supreme Court's reliance upon those decisions to uphold the MinnesotaCare tax is wholly misplaced. The Minnesota Supreme Court's assertion that "*Darnell* and *Kidd* remain relevant when, as here, a taxpayer's claim that a tax is facially discriminatory is premised on a third party's tax burden" simply finds no support in *Jefferson Lines* or in any Commerce Clause case decided before or since. App., *infra*, at 14a n.6. The Minnesota court's contention that *Jefferson Lines* somehow preserves the validity of *Kidd* and *Darnell* is erroneous for the very simple reason that *Fulton* was decided *after* this Court's decision in *Jefferson Lines*. Moreover, *Fulton*'s unequivocal statement that *Kidd* and *Darnell* "are no longer good law under the Commerce Clause" admits of no exceptions. *Fulton Corp.*, 516 U.S. at 346.

3. "Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry." *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992). It is therefore unnecessary to demonstrate an actual impact on interstate commerce to invalidate a facially discriminatory tax. *See Armco Inc.*, 467 U.S. at 644 ("Appellee

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[10] Indeed, *Fulton* also strongly suggests that *Kidd* and *Darnell* are no longer valid as even equal protection precedents. 516 U.S. at 345 ("To the extent that *Darnell* evaluated a discriminatory state tax under the Equal Protection Clause, time simply has passed it by."); *see also id.* ("the opinion in *Darnell* does not exemplify [Justice Holmes's] customary merit").

suggests that we should require Armco to prove actual discriminatory impact on it . . . . This is not the test."). Nevertheless, the MinnesotaCare tax *does* have a pernicious and adverse effect on interstate commerce that confirms the tax's invalidity under the Commerce Clause.

A tax has a discriminatory impact on interstate commerce when it encourages a company to do business with in-state—rather than out-of-state—customers. *See Camps Newfound/Owatonna, Inc.*, 520 U.S. at 577-78 ("Economic protectionism . . . may include attempts to give local consumers an advantage over consumers in other States.") (internal quotation marks omitted). In *Camps Newfound/Owatonna*, for example, this Court invalidated a Maine property tax exemption for charitable organizations because it did not apply to institutions "operated principally for the benefit of persons who are not residents of Maine." Me. Rev. Stat. Ann. tit. 46, § 651(1)(A)(1) (Supp. 1996). In light of the tax exemption's express geographic limitations, the Court concluded that the provision facially discriminated against interstate commerce and was thus unconstitutional. *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 576. The Court also observed that the exemption had the impermissible discriminatory effect of inducing Maine charitable organizations to serve in-state customers, at the expense of their out-of-state counterparts. *Id.* "As a practical matter, the statute encourage[d] affected entities to limit their out-of-state clientele, and penalize[d] the principally nonresident customers of businesses catering to a primarily interstate market." *Id.*

This Court also identified a discriminatory impact on interstate commerce when it invalidated Washington's manufacturing tax exemption in *Tyler Pipe*, 483 U.S. at 246. Because the exemption applied only to companies that paid the State's wholesale tax, a Washington manufacturer who sold its goods out of state was liable for the manufacturing tax, while a Washington manufacturer who sold in state earned a tax exemption. *Id.* at 236. The Court concluded that this

framework impermissibly encouraged Washington manufacturers to sell to in-state customers in order to avoid payment of the manufacturing tax. *Id.* at 246.

The MinnesotaCare tax has a similar discriminatory effect upon interstate commerce. By requiring Mayo and other Minnesota medical reference laboratories to pay a gross receipts tax on revenues that they receive from out-of-state customers but exempting their revenues from in-state sales, the MinnesotaCare tax encourages these Minnesota companies to transact business with in-state—rather than out-of-state—customers. This discriminatory effect upon interstate commerce is indistinguishable from the discrimination condemned in *Camps Newfound/Owatonna* and *Tyler Pipe*. Indeed, the discrimination is especially pernicious here because Mayo provides state-of-the-art medical testing services that are highly sought-after by health-care institutions throughout the country. The MinnesotaCare tax induces Mayo to devote a disproportionate share of its finite testing resources to in-state customers, to the detriment of out-of-state customers seeking the same services. Review by this Court is warranted to rectify the perverse and parochial incentives the dormant Commerce Clause operates to prevent.

II. THE MINNESOTA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THREE OTHER STATE SUPREME COURTS.

Not only does the Minnesota Supreme Court's decision conflict with this Court's dormant Commerce Clause jurisprudence, but it also conflicts with the decisions of four other state appellate courts that invalidated state taxes legally indistinguishable from the MinnesotaCare tax. This Court should grant certiorari to resolve this confusion among the state

courts by providing a definitive answer to the question left unresolved in *Jefferson Lines*.[11]

1. The Minnesota Supreme Court's conclusion that a State may constitutionally grant a tax exemption based upon a third party's payment of an in-state tax without also affording an exemption premised upon equivalent out-of-state payments conflicts with decisions of the Supreme Courts of Kentucky, North Dakota, and Pennsylvania, as well as with a decision of the California Court of Appeal.

In *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003), the North Dakota Supreme Court invalidated a state income tax deduction that applied to corporate taxpayers who received dividends from a company subject to North Dakota's corporate income tax but that was inapplicable where the issuing company paid income taxes to another State. *Id.* at 230. Relying upon this Court's decision in *Fulton*, the North Dakota Supreme Court concluded that the dividends deduction facially discriminated against interstate commerce because it failed to account for an out-of-state company's payment of another State's income tax. *Id.* at 234. The court explained that the State "ignore[d] the corporate income tax that an out-of-state corporation's state might impose on the out-of-state corporation's profits, which effectively impose[d] a double layer of tax on the out-of-state income but not on the in-state income." *Id.*

Similarly, in *Farmer Bros. v. Franchise Tax Board*, 134 Cal. Rptr. 2d 390 (Ct. App.), *review denied*, 2003 Cal.

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[11] Because the Tax Injunction Act, 28 U.S.C. § 1341, prohibits federal courts from enjoining the operation of a state tax, federal courts generally do not pass upon the validity of state taxes. The state court split concerning the constitutionality of third-party-based tax exemptions is therefore all the more problematic because state courts are the sole forum for adjudicating the validity of state taxes and should apply uniform constitutional standards when undertaking such inquiries. Only this Court can ensure such uniformity.

LEXIS 6515 (Cal. 2003), the California Court of Appeal invalidated a statute that provided corporate taxpayers with a tax deduction for dividends received from other companies when those dividends were declared from income subject to California taxation, but that offered no deduction where the dividend was declared from income taxed by another State. *Id.* at 393. Relying upon *Fulton* and *Armco*, the California Court of Appeal concluded that the tax violated the dormant Commerce Clause because the "deduction . . . discriminates between transactions on the basis of an interstate element, which is facially discriminatory under the commerce clause." *Id.* at 398.

It is also impossible to reconcile the Minnesota Supreme Court's holding with *Annenberg v. Commonwealth*, 757 A.2d 333 (Pa. 1998), in which the Pennsylvania Supreme Court invalidated a personal property tax on stock ownership that provided an exemption for stock issued by corporations subject to either the State's capital stock tax or its franchise tax, but that did not afford an exemption where the issuing corporation paid similar taxes to other States. *Id.* at 336. The Pennsylvania Supreme Court concluded that the tax facially discriminated against interstate commerce because the "only stock on which an owner is liable to pay tax . . . is on stock in foreign corporations which do not do business in Pennsylvania" (*id.*); the court explained that "discrimination against foreign corporations, and the preferential treatment afforded corporations which were either incorporated in Pennsylvania or do business in Pennsylvania, is plain to see." *Id.* at 337; *see also Annenberg v. Commonwealth*, 757 A.2d 338, 352 (Pa. 2000) (concluding that the Pennsylvania tax was not a valid compensatory tax and that it therefore violated the dormant Commerce Clause).

In *St. Ledger v. Commonwealth*, 912 S.W.2d 34 (Ky. 1995), the Kentucky Supreme Court initially upheld a stock ownership tax that provided an exemption where the issuing corporation paid Kentucky taxes on at least 75% of its total

property. *Id.* at 43. The court deemed *Darnell*—the same case invoked by the Minnesota Supreme Court—to be "directly on point and . . . dispositive." *Id.* This Court then vacated the Kentucky Supreme Court's decision and remanded the case for further consideration in light of *Fulton*. *St. Ledger v. Ky. Revenue Cabinet*, 517 U.S. 1206 (1996). On remand, the Kentucky court recognized that, after *Fulton*, *Darnell* was no longer a viable dormant Commerce Clause precedent and that its prior decision therefore could not stand. *See St. Ledger v. Commonwealth*, 942 S.W.2d 893, 896 (Ky. 1997) ("the Supreme Court held that *Darnell* had been bypassed by later Commerce Clause decisions"). The court accorded controlling weight to *Fulton* and invalidated the Kentucky tax scheme because it facially discriminated against interstate commerce. *Id.*

The Minnesota Supreme Court's decision is at odds with all of these state court cases. Indeed, the decision below is flatly inconsistent with *D.D.I.* and *Farmer Bros.* The North Dakota and California courts invalidated provisions that offered a tax exemption to stockholders where the dividend-issuing corporation paid an in-state tax but not an equivalent out-of-state tax. The Minnesota Supreme Court, however, relied upon a flawed distinction between third-party-based exemptions and single-taxpayer exemptions, as well as the discredited decisions in *Kidd* and *Darnell*, to uphold an analogous exemption that applies where Mayo's customers pay the MinnesotaCare tax but not where its customers pay a similar gross receipts tax to another State. The North Dakota, California, and Minnesota taxes all facially discriminate against interstate commerce because none provides the requisite parallel exemption based upon payment of out-of-state taxes by third parties. Only the Minnesota Supreme Court concluded that such discrimination is compatible with the dormant Commerce Clause.

Similarly, in *Annenberg* and *St. Ledger*, the Supreme Courts of Pennsylvania and Kentucky refused to recognize

the distinction between third-party-based exemptions and taxpayer-based exemptions that was sanctioned by the Minnesota Supreme Court, and those courts flatly refused to follow *Kidd* and *Darnell*. Consistent with the "general requirement of equal treatment [that] is . . . amply clear from [this Court's] precedent," *Jefferson Lines, Inc.*, 514 U.S. at 192 n.6, the Pennsylvania and Kentucky courts concluded that the dormant Commerce Clause requires equal treatment of in-state and out-of-state transactions even if a tax exemption is premised upon a third party's tax payments. This Court's review is necessary to resolve the conflict among these state court decisions.

2. The exceptional importance of obtaining a definitive answer to the question left unresolved in *Jefferson Lines* is underscored by the fact that Minnesota is only one of several States that utilize third-party-based exemptions to tax revenues generated by health-care providers from out-of-state—but not in-state—sales. *See, e.g.*, Ky. Rev. Stat. Ann. § 142.301(5); W. Va. Code § 11-27-20.[12] Indeed, until this Court expressly addresses the constitutionality of third-party-based exemptions, States will be free to use such measures to circumvent the dormant Commerce Clause's restrictions in not only the health-care field but also all other areas of taxation. For example, under the Minnesota Supreme Court's reasoning, a State could enact a discriminatory gross receipts tax that provides an exemption for wholesale revenues gener-

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[12] The Kentucky health-care provider tax exempts "[a]mounts received by any provider . . . from another provider . . . [that] is subject to the [Kentucky health-care provider] tax." Ky. Rev. Stat. Ann. § 142.301(5). West Virginia explicitly prohibits its health-care provider tax from being assessed more than once on any service, thereby exempting revenues that a health-care institution receives from an in-state—but not an out-of-state—hospital that subsequently resells the service to a patient. W. Va. Code § 11-27-20 ("[g]ross receipts derived from furnishing a health care item or service to a patient shall be taxed only one time under this article").

ated from sales to retailers who themselves are subject to the State's gross receipts tax. *See, e.g.*, Mont. Code Ann. § 15-68-208 (exempting sales where the purchaser will resell the property in a transaction subject to Montana's sales tax); N.M. Stat. Ann. § 7-9-48 (exempting "[r]eceipts for selling a service for resale" where the resale itself is subject to New Mexico's gross receipts tax). Such a taxation scheme discriminates against interstate commerce and discourages wholesalers from selling to out-of-state retailers. *Cf. Camps Newfound/Owatonna, Inc.*, 520 U.S. at 575 ("To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides."). State courts should evaluate the validity of these third-party-based tax exemptions under a uniform constitutional standard, which can only be obtained if this Court authoritatively resolves the issue it reserved in *Jefferson Lines*.

Moreover, facilitating the free flow of commerce among the several States has been a matter of exceptional importance since the Founding. Indeed, the "Framers granted Congress plenary authority over interstate commerce in the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Or. Waste Sys.*, 511 U.S. at 98. The Minnesota Supreme Court's decision is an impediment to the dormant Commerce Clause's "fundamental purpose . . . [of] assur[ing] that there be free trade among the several States," *Boston Stock Exch.*, 429 U.S. at 335, and jeopardizes the principles of nondiscrimination and national unity that animate both the Commerce Clause and the Constitution as a whole. This case therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[13]

Respectfully submitted.

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November 28, 2005

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[13] On September 27, 2005, this Court granted certiorari in *DaimlerChrysler Corp. v. Cuno* (No. 04-1704), and *Wilkins v. Cuno* (No. 04-1724). The two cases present a dormant Commerce Clause challenge to the Ohio investment tax credit, Ohio Rev. Code Ann. § 5733.33, which provides a corporate taxpayer with a credit against the State's franchise tax when it purchases and installs new machinery in Ohio but not when the taxpayer installs new machinery in other States. The Sixth Circuit invalidated the credit on the ground that it facially discriminates against interstate commerce and impermissibly encourages in-state economic development at the expense of out-of-state development. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). Because both the Sixth Circuit's decision in *Cuno* and the Minnesota Supreme Court's decision below concern the applicability of the dormant Commerce Clause's prohibition on facial discrimination against interstate commerce, this Court may wish to hold this petition pending *Cuno*'s resolution if it does not grant plenary review.

APPENDIX

APPENDIX A

Supreme Court of Minnesota

MAYO COLLABORATIVE SERVICES, INC., Relator, v. COMMISSIONER OF REVENUE, Respondent.	No. A04-2190 June 30, 2005 As Amended on Denial of Rehearing July 29, 2005

John W. Windhorst, Jr., William R. Goetz, Dorsey & Whitney, L.L.P., Minneapolis, MN, for Relator.

Mike Hatch, Attorney General, Barry R. Greller, Assistant Attorney General, St. Paul, MN, for Respondent.

Heard, considered, and decided by the court en banc.

OPINION

HANSON, Justice.

We review the question of whether the MinnesotaCare tax on the gross revenues of health-care providers transacting business in Minnesota violates the Commerce Clause of the United States Constitution because it allows an exemption for revenues received from other health-care providers who

are also subject to the MinnesotaCare tax. Relator Mayo Collaborative Services, Inc. (Mayo) argues that the statute imposes an unreasonable burden on interstate commerce because it allows an exemption for intrastate transactions but not for interstate transactions. The tax court upheld the MinnesotaCare tax and affirmed the decision of respondent Commissioner of Revenue (Commissioner) to deny Mayo's claims for exemption of revenues from non-Minnesota health-care providers. *Mayo Collaborative Servs., Inc. v. Comm'r of Revenue*, No. 7605, 2004 WL 2199503 (Minn. Tax Regular Div. Sept. 21, 2004). We affirm, although on slightly different grounds.

The parties submitted the case to the tax court on stipulated facts. Mayo is a Rochester, Minnesota, medical reference laboratory that performs tests on medical samples. As a health-care provider transacting business in Minnesota, Mayo was subject to a 1.5% MinnesotaCare tax on gross revenues. Minn.Stat. §§ 295.50, subd. 4; 295.51, subd. 1; 295.52, subd. 7 (2000). To avoid "pyramiding" tax liability, Minn.Stat. § 295.53, subd. 1(a)(4)-(5) (2000) provided a resale exemption that permitted providers such as Mayo to exclude revenue received from other health-care providers that will resell Mayo's services and will themselves be subject to the MinnesotaCare tax on that resale. The version of the statute applicable to this case contained the following exemptions:

> (a) The following payments are excluded from the gross revenues subject to the hospital, surgical center, or health care provider taxes under sections 295.50 to 295.59:
>
> * * * *
>
> (4) payments received from hospitals or surgical centers for goods and services on which liability for tax is imposed under section 295.52
> * * *.

> (5) payments received from health care providers for goods and services on which liability for tax is imposed under this chapter * * *.

Minn.Stat. § 295.53, subd. 1(a)(4)-(5).[1]

For the tax years 1998 through 2001, Mayo reported its gross revenues from all sources but then deducted, as exempt, revenue received from all health-care providers, including those located and transacting business outside of Minnesota and regardless of whether the provider was liable for MinnesotaCare tax on its revenue. The Commissioner allowed Mayo to deduct as exempt revenue received from "Minnesota entities" but disallowed deductions for "non-Minnesota receipts," and then imposed an additional tax of $4,450,502 and interest of $860,977.

On appeal to the tax court, Mayo argued that the MinnesotaCare revenue exemption violated the Commerce Clause because it discriminated against interstate commerce and was not "fairly apportioned," violating two prongs of what has come to be known as the *Complete Auto* test.[2] Mayo argued

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[1] This language now appears at Minn.Stat. § 295.53, subd. 1(a)(3)-(4) (2004).

[2] In *Complete Auto Transit, Inc. v. Brady*, the United States Supreme Court said that the Commerce Clause requires state taxes to (1) have a "substantial nexus to the taxing State," (2) be "fairly apportioned," (3) not discriminate against interstate commerce, and (4) "fairly relate[ ] to the services provided by the State." 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). To show that a tax violates the clause, a taxpayer must show that the tax does not satisfy at least one of these prongs. *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 310-11, 114 S.Ct. 2268, 129

[Footnote continued on next page]

that the exemption facially discriminated against interstate commerce because it provided an exemption for revenue received from a provider that would resell the service in Minnesota but not from a provider that would resell the service in any other state. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-76, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (stating that a tax is facially discriminatory, and therefore "virtually per se invalid," if it "expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market"). In addition, Mayo argued that the exemption was not fairly apportioned because it violated the United States Supreme Court's "internal consistency" test. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear.").

The Commissioner argued that the exemption was not facially discriminatory because, by its plain language, the exemption was based on whether the customer had already paid the tax, not on whether the customer was located out of state. The Commissioner argued that the exemption was internally consistent because the MinnesotaCare tax scheme

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[Footnote continued from previous page]

L.Ed.2d 244 (1994). Recently, the United States Supreme Court reaffirmed that *Complete Auto* provides a framework for determining whether a state tax violates the Commerce Clause. *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. --- , 125 S.Ct. 2419, 2426, --- L.Ed.2d ---, 2005 WL 1421164, slip op. at *6 (2005).

ensures that tax is imposed on a specific medical service only once, albeit on different taxpayers: when Mayo serves a Minnesota customer, that customer pays the MinnesotaCare tax; but when Mayo serves a non-Minnesota customer, Mayo pays the tax.[3]

The tax court held in favor of the Commissioner, reasoning that the MinnesotaCare tax exemption was not facially discriminatory because it was not based on geography, and was internally consistent and thus fairly apportioned because the tax was being assessed on a "single taxpayer, the Minnesota lab," and there was no risk that any state would impose tax on the same health-care service more than once. *Mayo Collaborative Servs.*, 2004 WL 2199503 at *7-*9.

The parties renew their arguments before this court. In addition, to demonstrate that the exemption was not geographically based and therefore not facially discriminatory, the Commissioner asserts that Mayo could not deduct revenue received from a Minnesota customer who was not subject to the MinnesotaCare tax, such as a patient who seeks Mayo's laboratory services directly without first visiting a hospital or clinic. And, to demonstrate that the Minnesota-

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[3] Before the tax court, the Commissioner also argued that Mayo had not satisfied the threshold question of whether the MinnesotaCare tax "implicates" the Commerce Clause. *See, e.g., Stelzner v. Comm'r of Revenue*, 621 N.W.2d 736, 740 (Minn.2001) (stating that, when examining whether a state tax unduly burdens interstate commerce, this court determines (1) whether the tax "implicates" the Commerce Clause and, only if so, (2) whether the tax violates the clause). The tax court concluded that the MinnesotaCare tax did implicate the Commerce Clause and the Commissioner has not appealed that conclusion.

Care tax scheme was fairly apportioned under the internal consistency test, the Commissioner argues that any threat of multiple taxation as a burden on interstate commerce is eliminated by a tax credit that is provided for a health-care provider "that has paid taxes to another jurisdiction measured by gross revenues and is subject to [MinnesotaCare] tax * * * on the same gross revenues * * *." Minn.Stat. § 295.54, subd. 1 (2000). Mayo does not dispute that it could not exclude revenue received from a Minnesota patient who seeks Mayo's services directly, but argues that this is irrelevant because the exemption applies only to revenue from sales for resale, not to retail sales. As for the tax credit, Mayo argues that it is inapplicable because any health-care provider that is subject to the MinnesotaCare tax could not have "paid taxes to another jurisdiction," construing the word "paid" to mean being legally liable for the tax.

When reviewing decisions from the Minnesota Tax Court, we determine (1) whether the tax court had jurisdiction, (2) whether the tax court decision was supported by the evidence and was in conformity with the law, and (3) whether the tax court committed any other error of law. *Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 551-52 (Minn. 2003); Minn.Stat. § 271.10, subd. 1 (2004). When parties stipulate to underlying facts, we need consider only whether applicable law was applied properly and our review is de novo. *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 830 (Minn.2002).

States have wide latitude to establish taxation schemes, and "a taxpayer challenging the constitutionality of a state tax statute bears a heavy burden." *Id.*; *see also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (citing precedent indicating that taxpayer bears "distinct burden" of proof by "clear and cogent evidence"). "The presumption is that a statute is constitutional, and we are required to place a construction on

the statute that will find it so if at all possible." *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 (Minn.2004).

I.

We begin by examining whether the MinnesotaCare exemption discriminates against interstate commerce, in violation of prong 3 of the *Complete Auto* test. *See* note 2, *supra*. The petitioner bears the burden of providing "convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities." *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. ---, 125 S.Ct. 2419, 2425, --- L.Ed.2d ---, 2005 WL 1421164, at *5 (2005). A state tax discriminates against interstate commerce if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) (citations omitted). Stated another way, a state tax discriminates against interstate commerce if it gives "differential treatment [to] in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Env'tl Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Such discrimination may occur in one of three ways: "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Taxation, New Jersey Dep't of Treas.*, 490 U.S. 66, 75, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989); *Caterpillar, Inc. v. Comm'r of Revenue*, 568 N.W.2d 695, 699 (Minn.1997).

Mayo does not argue that the exemption had a discriminatory intent or purpose. The Commissioner suggests, and Mayo does not disagree, that the purpose of the revenue exemption was to avoid "pyramiding" tax liability, based on an intent to avoid multiple taxation within Minnesota. We conclude that there is no basis to find that the purpose or intent

of the revenue exemption was to discriminate against interstate commerce.

Likewise, Mayo does not explicitly argue that the revenue exemption was discriminatory in effect. Instead, it argues that the MinnesotaCare exemption facially discriminates against interstate commerce "because it denies an exclusion for payments received from non-Minnesota providers that is allowed for payments received from Minnesota providers." The United States Supreme Court has held that a state tax is facially discriminatory, and therefore virtually per se invalid, if it "*expressly* distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market." *Camps Newfound*, 520 U.S. at 575-76, 117 S.Ct. 1590 (emphasis added).

The Commissioner argues that the MinnesotaCare tax revenue exemption does not expressly condition the exemption on where health-care providers or their customers are located, and therefore may be distinguished from cases in which we, as well as the United States Supreme Court, have held tax statutes to be facially discriminatory. *See Chapman*, 651 N.W.2d at 834 (holding that statute affording tax deduction for contributions to charity "located in and carrying on substantially all of its activities" in Minnesota was facially discriminatory because "[o]n its face, the statute treats contributions to in-state charitable organizations differently from contributions to out-of-state charitable organizations"); *Oregon Waste Sys., Inc.*, 511 U.S. at 96, 100, 114 S.Ct. 1345 (holding solid-waste surcharge based on costs attributable to handling out-of-state waste facially discriminatory because the "geographic distinction * * * patently discriminates against interstate commerce"); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 338, 344, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992) (holding state surcharge on solid waste "generated outside of Alabama" facially discriminatory).

Mayo suggests that the requirement that the geographic distinction be express was invalidated in *Camps Newfound*, a case involving a Maine statute that limited property tax relief for charities incorporated in the state that were "in fact conducted or operated principally for the benefit of persons who are not residents of Maine." 520 U.S. at 568, 117 S.Ct. 1590 (quoting Me.Rev.Stat. Ann., Tit. 36, § 652(1)(A) (Supp. 1996)). The Court held the statute facially discriminatory because the tax burden was "felt almost entirely by out-of-staters, deterring them from enjoying the benefits of camping in Maine." *Camps Newfound*, 520 U.S. at 581, 117 S.Ct. 1590. But, like the statutory language in *Chapman*; *Oregon Waste*, and *Chemical Waste*, the statute in *Camps Newfound* was explicitly based on geography—whether benefits were enjoyed by "persons who are not *residents* of Maine." *Camps Newfound*, 520 U.S. at 568, 117 S.Ct. 1590 (emphasis added). By contrast, the MinnesotaCare exemption is based on whether the revenue is received from a hospital, surgical center, or a health-care provider on whom "liability for tax is imposed," without explicit reference to the location of that provider. Minn.Stat. § 295.53, subd. 1(a)(4)-(5).

Mayo suggests that a specific reference to geography is unnecessary for facial discrimination and refers us to *Armco Inc. v. Hardesty*, 467 U.S. 638, 642-43, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), and *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232, 240-41, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987), as holding that the taxes challenged in those cases were "facially discriminatory because of their potential impact on interstate commerce." We find these two cases to be the most relevant to our consideration.

In *Armco*, the Court held that the West Virginia gross receipts tax on wholesale sales of tangible property within the state was facially discriminatory because it exempted sales by domestic manufacturers who were obligated to pay a

higher manufacturing tax on the value of products manufactured in West Virginia. 467 U.S. at 642-43, 104 S.Ct. 2620. The Court determined that the wholesale tax, "on its face," taxes a wholesale transaction "more heavily when it crosses state lines than when it occurs entirely within the state." *Id.* at 642, 104 S.Ct. 2620. The Court reasoned:

> The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it.

Id.

In *Tyler Pipe*, the Court held that a Washington manufacturing tax on the value of products manufactured in Washington was facially discriminatory against interstate commerce because it exempted that portion of a domestic manufacturer's output that was subject to Washington's gross proceeds tax on wholesale sales within the state. 483 U.S. at 240-41, 107 S.Ct. 2810. The Court determined that Washington's "exemption for manufacturers that sell their products within the State has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*." *Id.* at 240, 107 S.Ct. 2810.

Armco and *Tyler Pipe* each involved a taxing structure that had some aspects that were parallel to the MinnesotaCare tax. Each contained a multiple transaction exemption that was designed to avoid the pyramiding of taxation—that is, West Virginia exempted a manufacturer from the wholesale tax to the extent it was subject to West Virginia's tax on manufacturing; Washington exempted a manufacturer from the manufacturing tax to the extent it was subject to Washington's tax on wholesale sales; and Minnesota exempted a health-care provider from the gross revenues tax on health-care services to the extent that another health-care provider was subject to the MinnesotaCare tax on the same services.

Armco and *Tyler Pipe* support Mayo's facial discrimination argument to the extent that the exemptions in West Virginia and Washington were based on the fact that the taxable transaction was subject to a separate tax of the same state and that separate tax could be applicable only to intrastate transactions.[4]

In *Tyler Pipe*, the Court suggested that to avoid discrimination against interstate commerce, a multiple activities exemption should "provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." 483 U.S. at 246, 107 S.Ct. 2810. Extrapolating this reasoning to the MinnesotaCare tax, one could suggest that to avoid discrimination against interstate commerce, the Minnesota exemption should have applied to gross revenues from a transaction that was subject to a separate gross revenue tax in any state, not just in Minnesota.

In *Jefferson Lines*, the Court posited a hypothetical tax structure that also had some parallel aspects to *Armco*; *Tyler Pipe*, and the MinnesotaCare tax. *Jefferson Lines*, 514 U.S. at 192 n. 6, 115 S.Ct. 1331. The Court explained:

> [I]f Texas were to impose a tax upon the bus company measured by the portion of gross re-

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[4] *Armco* and *Tyler Pipe* seem to place less reliance on the requirement that the geographic distinctions be "express" because, in essence, the exemptions were measured (as in the MinnesotaCare tax exemption) by whether the transaction was subject to another tax. *Armco* and *Tyler Pipe* can be read to support the conclusion that the exemptions were sufficiently transparent to satisfy the "express" requirement because the transaction could be subject to the other tax only if that transaction was conducted intrastate.

> ceipts reflecting in-state travel, it would have to impose taxes on intrastate and interstate journeys alike. In the event Texas chose to limit the burden of successive taxes attributable to the same transaction by combining an apportioned gross receipts tax with a credit for sales taxes paid to Texas, for example, it would have to give equal treatment to service into Texas purchased subject to a sales tax in another State, which it could do by granting a credit for sale taxes paid to any State.

Id. at 192 n. 6, 115 S.Ct. 1331.[5]

Although *Armco*; *Tyler Pipe*, and the footnote hypothetical in *Jefferson Lines* might be read to suggest that a tax exemption such as Minnesota's is facially discriminatory if applied to in-state sales but denied to out-of-state sales, there is a crucial distinction between those circumstances and this case. In *Armco*; *Tyler Pipe*, and the *Jefferson Lines* hypo-

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[5] Interestingly, despite this statement that Texas would have to extend any credit for sales taxes paid to both in-state and out-of-state taxes, the Court then seemed to backtrack, stating:

> Although we have not held that a State imposing an apportioned gross receipts tax that grants a credit for sales taxes paid in state must also extend such a credit to sales taxes paid out of state, we have noted that equality of treatment of interstate and intrastate activity has been the common theme among the paired (or "compensating") tax schemes that have passed constitutional muster.

Jefferson Lines, 514 U.S. at 193 n. 6, 115 S.Ct. 1331 (citations omitted).

thetical, the successive taxation fell upon the same taxpayer. Here, the successive tax on which the exemption is based is paid by a third party. And in *Jefferson Lines*, the Court concluded the hypothetical discussion by stating, "We express no opinion on the need for equal treatment when a credit is allowed for payment of in—or out-of-state taxes by a third party. *See Darnell v. Indiana*, 226 U.S. 390, 33 S.Ct. 120, 57 L.Ed. 267 (1912)." *Jefferson Lines*, 514 U.S. at 193 n. 6, 115 S.Ct. 1331.

Darnell involved an Indiana tax on stock owned by a taxpayer domiciled in Indiana. All shares of stock whether in domestic or foreign corporations were subject to the tax, but there was an exemption for shares of a corporation where the property of the corporation "is not exempt or is not taxable to the corporation itself." 226 U.S. at 397, 33 S.Ct. 120. In other words, the ownership tax would not apply to domestic stock if the property of the domestic corporation was taxed in Indiana, but ownership of foreign stock was taxed even if the property of the foreign corporation was taxed in another jurisdiction. The Court held that this did not violate the Commerce Clause because Indiana was entitled to treat the foreign stock as untaxed for Indiana taxation purposes because the property of the foreign corporation was not taxed in Indiana. *Id.* at 398, 33 S.Ct. 120.

The Court said that this conclusion followed *Kidd v. Alabama*, 188 U.S. 730, 23 S.Ct. 401, 47 L.Ed. 669 (1903), involving an Alabama tax on stock ownership. The Alabama statute taxed the ownership of domestic stock, but gave a credit/exemption for equivalent taxes paid on the property of the domestic corporation. Ownership of foreign stocks was taxed with no credit for taxes paid on the foreign corporations' property in other states. In *Kidd*, the Court said:

> The state of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its

> laws, then for the purpose of its laws the property is not taxed at all.

Id. at 732, 23 S.Ct. 401.[6]

Because Mayo bears a heavy burden to provide "convincing evidence" that the MinnesotaCare tax is discriminatory, *see Am. Trucking Ass'ns, Inc.*, --- U.S. ---, 125 S.Ct. 2419, 2425, --- L.Ed.2d ---, 2005 WL 1421164, and because decisions of the United States Supreme Court suggest that the Interstate Commerce Clause does not require equal treatment when an exemption is allowed for payment by a third party of a separate in-state tax but not of a separate out-of-state tax, we affirm the tax court's conclusion that the MinnesotaCare statute is not facially discriminatory under *Complete Auto. Mayo Collaborative Servs.*, 2004 WL 2199503 at *8.

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6 We recognize that in *Fulton Corp. v. Faulkner*, where the "only issue" was whether a facially discriminatory tax was nevertheless constitutional as a "compensatory" tax, the Supreme Court held that *Darnell* and *Kidd* were "no longer good law under the Commerce Clause." *Fulton*, 516 U.S. at 333-34, 346. But we read this holding as distinguishing *Darnell* and *Kidd* for the constitutional standard that a state must satisfy to justify a facially discriminatory tax—"strictest scrutiny" not "rational basis." *Id.* at 345-46. This distinction is not material to our analysis of whether the MinnesotaCare tax is facially discriminatory. Further, we cannot ignore that when the tax liability of a third-party is involved, the Court signaled in *Jefferson Lines* that *Darnell* remains relevant. *See Jefferson Lines*, 514 U.S. 192-93 n.6. Thus, when we view *Jefferson Lines* and *Fulton* together, we conclude that *Darnell* and *Kidd* remain relevant when, as here, a taxpayer's claim that a tax is facially discriminatory is premised on a third party's tax burden.

II.

Next, we consider whether the MinnesotaCare tax revenue exemption was "fairly apportioned" under prong 2 of the *Complete Auto* test, which now incorporates the United States Supreme Court's "internal consistency" test.

"[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). This principle is "the lineal descendant of [the] prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Jefferson Lines*, 514 U.S. at 184, 115 S.Ct. 1331. "A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Tyler Pipe*, 483 U.S. at 247, 107 S.Ct. 2810 (quoting *Armco*, 467 U.S. at 644-45, 104 S.Ct. 2620); *see also* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 Fordham L. Rev. 149, 182 (2002) ("Properly understood, fair apportionment is a 'second order' constitutional value, a means to effectuate the 'higher order' objectives of preventing discrimination against interstate commerce and to ensure that states have a sufficient nexus with the values they seek to tax.").

Recently, in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, the Supreme Court observed that the internal consistency test is "typically used where taxation of interstate transactions are at issue," the relevant inquiry being: "What would happen if all States did the same?" 125 S.Ct. at 2425, 2005 WL 1421164, at *6. At issue was whether Michigan's $100-per-vehicle annual fee on trucks that perform point-to-point deliveries inside state borders was constitutional given that truckers typically "top off" interstate loads with intrastate loads. *Id.* at 2424-25,

2005 WL 1421164 at *2, *4, *6. The Court observed that it "must concede" that a trucker would be subject to multiple fees if states besides Michigan enacted such laws, but nevertheless held that the tax was constitutional because "[a]n interstate firm with local outlets normally expects to pay local fees that are uniformly assessed upon all those who engage in local business." *Id.* at 2425, 2005 WL at *6.

Because American Trucking was decided after oral argument, Mayo and the Commissioner argued apportionment of the MinnesotaCare exemption primarily under *Jefferson Lines*, which at the time provided the Supreme Court's most-recent guidance on the question. After reiterating that the possibility of multiple taxation is the central question, the Court observed that the "threat of malapportionment" is subject to the "internal consistency" rule:[7]

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[7] The use of the "internal consistency" test to determine fair apportionment first surfaced in *Container Corp. of America v. Franchise Tax Board*, a case involving a state "unitary business" tax where the Court held that the first inquiry as to fair apportionment "is what might be called internal consistency—that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." 463 U.S. at 169, 103 S.Ct. 2933. The Court then applied the internal consistency test to invalidate three state taxes, but not explicitly under the fair apportionment prong. *Am. Trucking Ass'ns, Inc., v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987); *Tyler Pipe*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199; *Armco*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540. In *Scheiner*, the Court held a state flat tax unconstitutional because it was not internally consistent and was not a "reasonable charge." 483 U.S. at 284, 278-89, 107 S.Ct. 2829. In *Tyler Pipe* and *Armco*, the Court cited the in-

[Footnote continued on next page]

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331.

Given that neither the MinnesotaCare tax nor the exemption involves an "interstate transaction," the internal consistency test may be inapplicable. *See American Trucking*, 125 S.Ct. at 2425, 2005 WL 1421164, at *6. Even if the test applies, the holding in *American Trucking* suggests that a tax that fails the test is not per se unconstitutional. *See id.* Ac-

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ternal consistency test and then commingled the discrimination prong with the fair apportionment prong, observing in both cases that a "tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Tyler Pipe*, 483 U.S. at 247, 107 S.Ct. 2810; *Armco*, 467 U.S. at 644, 104 S.Ct. 2620.

cordingly, we turn our analysis to *Jefferson Lines*, where the issue was whether an Oklahoma sales tax imposed on bus tickets sold in the state for travel within as well as outside the state was fairly apportioned. 514 U.S. at 177, 115 S.Ct. 1331. The Court held that the tax was fairly apportioned because it was internally and externally consistent and because there was no threat of multiple taxation. *Id.* at 184-88, 194-95, 115 S.Ct. 1331. "If every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." *Id.* at 185, 115 S.Ct. 1331.

In *Jefferson Lines*, the Court discussed two distinctions that are relevant to our facts. First, the Court suggested that the apportionment prong is concerned with multiple taxation through more than one jurisdiction imposing tax on a single transaction. The Court explained that the essential purpose of the apportionment prong is to assure that a state imposes tax only on its fair share of an interstate transaction, and notes that this principle is "the lineal descendent of [the] prohibition of multiple taxation." *Id.* at 184, 115 S.Ct. 1331. When the Court referred to multiple taxation of a single interstate transaction, the references are all singular—to a buyer, a sale, a transaction. As applied to Mayo, then, *Jefferson Lines* suggests that a central question is whether a single transaction—here, a laboratory service—is subject to more than one jurisdiction's tax. Clearly, only Minnesota may impose tax on this transaction because the service occurs within Minnesota's borders. But our analysis cannot end here.

Beyond framing its analysis of multiple taxation in terms of a single taxable event, the Court in *Jefferson Lines* also referenced serial taxable events. But those references indicate that multiple taxation is not problematic in such situations. For example, in explaining that a sale of goods in a single transaction cannot be subject to multiple taxation, the Court explained:

> In deriving this rule covering taxation to a buyer on sales of goods we were not, of course, oblivious to the possibility of successive taxation of related events up and down the stream of commerce, and our cases are implicit with the understanding that the Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along. Thus, it is a truism that a sales tax to the buyer does not preclude a tax to the seller upon the income earned from a sale, and there is no constitutional trouble inherent in the imposition of a sales tax in the State of delivery to the customer, even though the State or origin of the things sold may have assessed a property or severance tax on it.

Id. at 187-88, 115 S.Ct. 1331 (emphasis added).

Later in the *Jefferson Lines* opinion, the Court addressed another aspect of successive taxation, asking:

> Although the sale with partial delivery cannot be duplicated as a taxable event in any other State, and multiple taxation under an identical tax is thus precluded, is there a possibility of successive taxation so closely related to the transaction as to indicate potential unfairness of Oklahoma's tax on the full amount of sale?

Id. at 191, 115 S.Ct. 1331. In this part of its analysis (apparently the external consistency element), the Court concluded that even if Texas were to apply an apportioned gross receipts tax on the Texas portion of the travel from Oklahoma City to Dallas, this would not constitute impermissible multiple taxation because

> interstate travel would not be exposed to multiple taxation in any sense different from coal for which the producer may be taxed first at point of severance by Montana and the customer may later be taxed upon its purchase in New York. The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions."

Id. at 192, 115 S.Ct. 1331 (footnote omitted).

The footnote to the above quotation addressed the issue of successive and complementary taxes at some length. *Id.* at 192-93 n. 6, 115 S.Ct. 1331. In this discussion, the Court again used the singular, referencing "the same transaction" several times. Based on these references in the *Jefferson Lines* opinion, it appears that the apportionment factor is aimed at multiple taxation of the same transaction. As applied here, there is no multiple taxation by other jurisdictions of Mayo's laboratory services.

The second distinction in *Jefferson Lines* relevant here is the Court's differentiation between "activities"-based taxes imposed on businesses that operate in several states, and taxes based on sales of goods and services. *Id.* at 186, 115 S.Ct. 1331. As for the activities-based taxes, the Court observed that taxes should be proportionate to activities that actually take place in the taxing jurisdiction, and that this often triggers an analysis that "center[s] around specific formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value." *Id.* (citing *Container Corp. of Am.*, 463 U.S. at 170, 103 S.Ct. 2933; *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 270, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978); *Central Greyhound Lines, Inc.*,

v. Mealey, 334 U.S. 653, 663, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948)).

As for sales-based taxes, the Court observed that it has "set a different course," and that the Commerce Clause does not require a tax to be apportioned to where a good ultimately is consumed:

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.
>
> * * * *
>
> In other words, the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction.

Id. at 186-87, 115 S.Ct. 1331 (citing *Wardair Canada, Inc., v. Florida Dep't of Revenue*, 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986); *State Tax Comm'n of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 83 S.Ct. 925, 10 L.Ed.2d 8 (1963); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940)). The Court further held that for fair apportionment purposes,

sales of services are indistinguishable from sales of goods. *Id.* at 188, 115 S.Ct. 1331.

On its face, the MinnesotaCare tax is based on whether a health-care provider "transact[s] business" in Minnesota, e.g., performs "activities" in the state. Minn.Stat. § 295.51, subd. 1; *see Jefferson Lines*, 514 U.S. at 186, 115 S.Ct. 1331. But unlike the facts to which the activities-based taxes discussed in *Jefferson Lines* were applied, the activities of Mayo that we consider here all occur within a single jurisdiction. And the MinnesotaCare tax exemption is essentially sales-based—it exempts revenue received from another provider who already was subject to the MinnesotaCare tax for the same "goods and services." Thus, as applied to Mayo, the combination of the tax and tax exemption more closely resembles a sales-based tax because the only services relevant to our analysis are those that Mayo performs wholly within Minnesota's borders. The imposition of the MinnesotaCare tax at the place where Mayo's services are performed insulates Mayo's customer from any threat of further taxation on those services. *See American Trucking*, 125 S.Ct. at 2423, 2005 WL 1421164, at *3 (upholding tax in part because the assessment "does not reflect an effort to tax activity that takes place, in whole or in part, outside the State").

Mayo employs a hypothetical under the internal consistency test to suggest that if Wisconsin had a law identical to MinnesotaCare and Mayo had a Wisconsin hospital as a customer, Mayo would pay Minnesota taxes on revenue received from its sale to the Wisconsin hospital, Mayo would pass through that tax in its charges to the hospital, and the hospital would also pay Wisconsin taxes on revenue it received from resale of Mayo's service to the patient. Mayo argues that this potential for multiple taxation in an interstate transaction would not exist in a comparable intrastate transaction because Mayo would be able to exempt the revenue received from its sale of services to a Minnesota hospital because the

resale of those services to the patient would be subject to the tax, resulting in only a single tax being applied to the intrastate sale and resale of lab services.

The Commissioner argues that Mayo's hypothetical is analytically incorrect because it looks at the combined effect of two states' taxes on two separate taxpayers (e.g., the Minnesota tax on Mayo and the Wisconsin tax on Mayo's healthcare provider customer). The Commissioner suggests that the critical question for internal consistency is whether the lab services would be taxed more than once and that question must be analyzed in the context of a "single taxpayer." The tax court agreed, concluding that Mayo's example only "demonstrates that intrastate commerce is discriminated against in the state which fails to provide a credit for lab services rendered and already taxed in another state, not that interstate commerce is bearing any additional tax burden." *Mayo Collaborative Servs., Inc.*, 2004 WL 2199503 at *8.

We agree with the Commissioner and the Tax Court that Mayo's hypothetical fails to prove that the MinnesotaCare tax scheme is internally inconsistent. Mayo's argument is that an out-of-state buyer risks paying state taxes twice-once when the hospital pays Wisconsin tax upon reselling Mayo's services, and again when Mayo "passes through" its Minnesota tax burden to its customer. This argument would require us to characterize the "pass through" charge as an imposition of the Minnesota tax. This we are not prepared to do given the Court's observation in *Jefferson Lines* that a sales-based tax

> falls on the buyer of the services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination.

514 U.S. at 190, 115 S.Ct. 1331.

In addition, in *Jefferson Lines*, the Court held that even under the internal consistency test, "the Commerce Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along." *Id.* at 187-88, 115 S.Ct. 1331. The Court acknowledged that successive taxes might be unfairly apportioned if "there is a possibility of successive taxation so closely related to the transaction as to indicate potential unfairness of [the selling jurisdiction's] tax on the full amount of sale," or if "the very possibility of apportioning * * * [is] a sufficient reason to conclude that the tax exceeds the fair share of the State of sale." *Id.* at 191, 115 S.Ct. 1331. But the taxpayer-buyers in *Jefferson Lines* "failed to raise any specter of successive taxes that might require us to reconsider whether an internally consistent tax on sales of services could fail the external consistency test for lack of further apportionment (a result that no sales tax has ever suffered under our cases)." *Id.* at 192, 115 S.Ct. 1331 (parenthetical in Court's opinion). "Nor has the taxpayer made out a case that Oklahoma's sales tax exposes any buyer of a ticket in Oklahoma for travel into another State to multiple taxation." *Id.* at 193, 115 S.Ct. 1331. Similarly, Mayo has raised no "specter" of actual successive taxation that might render the internally consistent tax scheme unfair.

Finally, even if the MinnesotaCare tax scheme could be considered internally inconsistent because, as Mayo argues, Mayo's pass-through of the Minnesota tax to a Wisconsin customer was deemed to be the imposition of the Minnesota tax on that customer, any potential for unfair apportionment would be eliminated by the MinnesotaCare credit provision.

The Supreme Court has signaled, and other courts and commentators agree, that any credit that serves to alleviate the threat of multiple taxation must be considered under the fair apportionment prong. *Jefferson Lines*, 514 U.S. at 194,

115 S.Ct. 1331 ("Oklahoma may rely upon use-taxing States" to provide a credit "for related taxes paid elsewhere"); *Tyler Pipe*, 483 U.S. at 245 n. 13, 107 S.Ct. 2810 (observing that tax would have been fairly apportioned had state provided "tax credits" that would "alleviate or eliminate the potential multiple taxation"); *Goldberg*, 488 U.S. at 261, 264, 109 S.Ct. 582 (Illinois taxing scheme fairly apportioned because it was internally consistent and because credit provision "operates to avoid actual multiple taxation"); *Gen. Motors Corp. v. City & County of Denver*, 990 P.2d 59, 69 (Colo.1999) (holding fair apportionment prong satisfied if tax relates to activity taking place within state or if credit is provided for similar taxes paid in other jurisdictions); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 182-83 (1988) ("A tax that appears to be internally inconsistent will nevertheless pass the 'internal consistency' test if the taxing state grants a credit for taxes paid to other states on the same tax base."). *But see Tennessee Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124, 726 N.Y.S.2d 350, 750 N.E.2d 52, 59 (2001) (holding credit provision "invalid" because court would need "to define the parameters of the credit and the manner in which it will be implemented," in violation of separation of powers).

The relevant version of the MinnesotaCare tax credit, Minn.Stat. § 295.54, subd. 1 (2000), stated:

> A hospital, surgical center, or health care provider that has *paid taxes to another jurisdiction* measured by gross revenues and is subject to tax under sections 295.52 to 295.59 *on the same gross revenues* is entitled to a credit for the tax legally due and paid to another jurisdiction to the extent of the lesser of (1) the tax actually paid to the other jurisdiction, or (2) the amount of tax imposed by Minnesota

> on the gross revenues subject to tax in the other taxing jurisdictions.

(Emphasis added.) Mayo argues that, properly construed, the credit would never have been available to the hypothetical Wisconsin hospital. Mayo focuses on two parts of the credit, suggesting (1) that the Wisconsin hospital would not have "paid taxes" to Minnesota because the Minnesota tax would be paid by Mayo and (2) that the gross revenues of Mayo that were the basis for the Minnesota tax would not be the "same gross revenues" as the revenues of the Wisconsin hospital that would be subject to the Wisconsin tax. We disagree with Mayo's construction for several reasons.

First, we are to presume that the legislature did not intend for the statute to violate the United States Constitution. Minn.Stat. § 645.17 (2004). Accordingly, "[w]here a[tax] statute is ambiguous, the construction that will avoid constitutional conflict is to be preferred, even though it is less natural." *Schumann v. Comm'r of Taxation*, 312 Minn. 477, 481-82, 253 N.W.2d 130, 132 (1977). This rule of construction is a corollary to rule that Mayo bears the burden of proving that the tax is unconstitutional. *Chapman*, 651 N.W.2d at 830.

Second, as to the words "paid taxes," Mayo cannot have it both ways. If the words "paid taxes" do not include Mayo's pass-through of the Minnesota tax to the Wisconsin customer, then there is no risk of multiple taxation of the Wisconsin customer and no internal inconsistency. But if we accept Mayo's hypothetical to the contrary, we would then be persuaded by the Commissioner's counter argument that the words "paid taxes" should be construed to include a party who bears the economic incidence of the tax, not just the party who bears the legal incidence of the tax. For purposes of the hypothetical, Mayo and the Commissioner agree that it is reasonable to assume that Mayo would pass through the MinnesotaCare tax to the Wisconsin hospital. This assumption means that the hypothetical Wisconsin hospital would

bear the economic incidence of the Minnesota tax and would thereby be eligible to claim the credit. Or, in the alternative, the hospital could claim a credit from Wisconsin, which under Mayo's hypothetical we must assume has adopted a credit provision identical to Minnesota's.

This interpretation of the words "paid taxes" is supported by legislative history. As originally enacted, the credit used language that would be more supportive of Mayo's interpretation. It offered a credit to any "resident" Minnesota health-care provider that was "liable for taxes payable" in another jurisdiction.[8] Act of April 23, 1992, ch. 549, art. 9, § 9, 1992 Minn. Laws 1487, 1614 (codified at Minn.Stat. § 295.54 (1992)). But in 1996, as a result of circumstances we will describe below, the legislature amended this language by broadening the availability of the credit from a "resident hospital or resident health care provider who is liable for taxes" in another jurisdiction to a "hospital, surgical center, pharmacy, or health care provider that has paid

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[8] The credit provided:

> A resident hospital or resident health care provider who is liable for taxes payable to another state or province or territory of Canada measured by gross receipts and is subject to tax under section 295.52 is entitled to a credit for the tax paid to another state or province or territory of Canada to the extent of the lesser of (1) the tax actually paid to the other state or province or territory of Canada, or (2) the amount of tax imposed by Minnesota on the gross receipts subject to tax in the other taxing jurisdictions.

Minn.Stat. § 295.54 (1992).

taxes" to another jurisdiction. Act of April 12, 1996, ch. 471, art. 6, § 9, 1996 Minn. Laws 1717, 1814 (codified at Minn.Stat. § 295.54, subd. 1 (1996)). Because the persons who are entitled to the credit under the 1996 amendment include both resident and nonresident providers, and only a resident provider would be directly liable for MinnesotaCare taxes, the words "paid taxes" must include those who paid the tax indirectly, as through a pass-through charge. Accordingly, we construe the words "paid taxes" to include a Wisconsin health-care provider that would bear the economic incidence of the MinnesotaCare tax when that tax is passed through by Mayo in its charges for laboratory services.

Third, as to the words "same gross revenues," we are persuaded that those words should be construed as a generic reference to the type of revenues that are subject to the MinnesotaCare tax, and include both the revenue on the original sale and the revenue on the resale of the same qualifying services.

Fourth, our acceptance of this broad construction of the "same gross revenues," and our broad reading of "paid taxes," are supported by the observation that, if the credit is not read broadly to apply to the hypothetical Wisconsin hospital, we cannot conceive of any situation to which it would apply. If the credit is construed narrowly, as Mayo suggests, the credit would never be available because a Wisconsin hospital would never be legally liable for the Minnesota tax imposed on its payment to Mayo for services that Mayo performed in Minnesota. Such a narrow reading conflicts with our assumption that every section of a statute has a purpose, and that no statutory language "should be deemed superfluous, void, or insignificant." *Vlahos v. R & I Const. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn.2004).

At oral argument, Mayo argued that its narrow construction of the credit would not make it meaningless. Mayo suggested that when the MinnesotaCare tax was originally en-

acted, it made nonresident hospitals subject to MinnesotaCare tax on any revenues from "patients domiciled in Minnesota." Act of April 23, 1992, ch. 549, art. 9, § 5, 1992 Minn. Laws 1487, 161 (codified at Minn. Stat § 295.50, subd. 3(a)(2) (1992)). Mayo argued that the purpose for the credit was to save these nonresident hospitals from the threat of double taxation if they were subject to the same tax by the state of their residence.

But this argument fails because, first, the credit as originally enacted applied only to "resident" providers and, second, the legislature retained and even expanded the credit after it removed nonresident hospitals from the tax. In 1993, physicians domiciled in Wisconsin, Iowa, and South Dakota sought an injunction to prevent application of the MinnesotaCare tax to them as nonresident providers, claiming violations of the Due Process and Commerce Clauses of the United States Constitution.[9] The district court employed the Commerce Clause to permanently enjoin the Commissioner from applying the MinnesotaCare tax to nonresident healthcare providers, observing that "[a]s written, the Act's reach is nationwide." *Baertsch v. Minnesota Dep't of Revenue*, No. C7-93-2680 (Ramsey County Dist. Ct., Sept. 15, 1994). In response to this ruling, the legislature amended the statute in 1996 to remove nonresident providers from the tax, but it retained the credit and, in fact, amended it to eliminate the restriction to resident providers and to clarify that the credit required only that the provider have "paid taxes" to another jurisdiction, not that it have been "liable for" taxes in another jurisdiction. Act of April 12, 1996, ch. 471, art. 6, §§ 1, 9, 1996 Minn. Laws 1717, 1810, 1814 (codified at Minn.Stat.

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[9] We ruled that the dispute was ripe and that the district court had jurisdiction. *Baertsch v. Minnesota Dep't of Revenue*, 518 N.W.2d 21 (Minn.1994).

§§ 295.50, subd. 3, and 295.54, subd. 1 (1996)). Obviously, the legislature intended that the credit would apply to some situation other than that of the nonresident hospitals.

The existence of the credit, as thus construed, eliminates any hypothetical burden on interstate commerce. A Minnesota hospital would not be encouraged to purchase all laboratory services in Minnesota because it would be entitled to credit any economic incidence of a tax imposed by another state on services bought from a provider in that state against the MinnesotaCare tax otherwise imposed on the revenue it received from the resale of those services to a patient in Minnesota. Likewise, a Wisconsin hospital would not be discouraged from purchasing its laboratory services in interstate commerce for the same reason.

We conclude that Mayo has not met its burden of proving that the MinnesotaCare tax revenue exemption, Minn.Stat. § 295.53, subd. 1(a)(4)-(5), is either unfairly apportioned or discriminatory under *Complete Auto*, and hold that the provision is constitutional under the Commerce Clause of the United States Constitution. We affirm the decision of the tax court.

Affirmed.

APPENDIX B

Minnesota Tax Court, Regular Division,
Ramsey County.

MAYO COLLABORATIVE SERVICES, INC., Appellant, v. COMMISSIONER OF REVENUE, Appellee,	No. 7605 Heard July 8, 2004. Sept. 21, 2004.

John W. Windhorst, Jr., Attorney at Law, of the law firm Dorsey & Whitney, represented the Appellant.

Barry R. Greller, Assistant Attorney General, represented the Appellee Commissioner of Revenue ("Commissioner").

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

SHERYL A. RAMSTAD, Judge.

The issue in this case is whether the denial of the Minn.Stat. § 295.53, subd. 1(a)(4)-(5) exclusion to amounts received by providers located and performing services outside Minnesota violates the Commerce Clause of the United States Constitution.

The parties stipulated to the facts and submitted the matter to the Court for judgment. The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

1. Mayo Collaborative Services, Inc. (Appellant) is a business corporation organized and existing under the laws of the State of Minnesota. Appellant's place of business is located in Rochester, Minnesota. Appellant is engaged in the business of providing medical reference laboratory services to hospitals, surgical centers, health care providers, and individual patients. A medical reference laboratory performs laboratory tests on samples submitted by its customers and reports to the customers on the test results. Appellant does not perform the laboratory services itself but purchases them from third parties, principally from Mayo Clinic Rochester, a nonprofit corporation affiliated with Appellant that operates a laboratory in Rochester, Minnesota. As a result of engaging in this business, Appellant is a health care provider within the meaning of Minn.Stat. § 295.50, subd. 4, and is subject to the MinnesotaCare tax imposed upon a health care provider by Minn.Stat. §§ 295.50-295.59.

2. Appellant timely filed annual MinnesotaCare tax returns with the Commissioner for the calendar years 1998 through 2001 ("Tax Periods") and paid the Commissioner the amounts of tax shown thereon to be due. Appellant also filed an amended MinnesotaCare tax return for the calendar year 1998 and paid the Commissioner the amount of tax shown thereon to be due with applicable interest. During the Tax Periods, the MinnesotaCare tax was imposed, pursuant to Minn.Stat. § 295.52, subd. 7, at the rate of 1.5% of gross revenues.

3. In preparing its tax returns (and the amended 1998 return) for the Tax Periods, Appellant included (at Line 1) the

gross revenues received from all sources for its medical reference laboratory services and excluded from those gross revenues (at Line 7) the amounts received for its medical reference laboratory services from customers that are hospitals, surgical centers of health care providers. The exclusions reflected amounts received from such customers located both within and without Minnesota. The amounts so excluded were:

Year	Amount
1998	$105,124,730
1999	122,628,785
2000	131,529,186
2001	144,667,847

4. In the Order dated June 12, 2003 ("Order"), the Commissioner disallowed that portion of the exclusion in Paragraph 3 that the Commissioner determined to represent "non-Minnesota receipts" paid from sources other than Medicare, medical assistance and government agency reimbursement. The amounts thus disallowed were:

Year	Amount
1998	$62,167,065
1999	72,518,347
2000	77,153,863
2001	84,860,886

5. The Order assessed additional tax liabilities against Appellant, equal to 1.5% of the disallowed exclusions, in the following amounts:

Year	Amount
1998	$932,506
1999	1,087,775
2000	1,157,308
2001	1,272,913
Total	$4,450,502

In addition, the Order assessed interest on the tax assessments (through June 12, 2003) in the following amounts:

Year	Amount
1998	$304,099
1999	267,522
2000	189,894
2001	99,462
Total	$860,977

6. A "preliminary audit report" showing the adjustments proposed by the Commissioner was prepared by the Commissioner and sent to Appellant on September 6, 2002.

7. The adjustments for "non-Minnesota receipts" made in Exhibits 6 and 7 reflected a computation made by the Commissioner for the sample month of December 2001.

8. Under Minn.Stat. §§ 295.50-295.59(a) the receipts of a medical reference laboratory located in Minnesota (such as Appellant) are excludible from taxable gross revenues if they are received from hospitals, surgical centers or health care providers that provide services on which liability for the MinnesotaCare tax is imposed and (b) liability for the tax is imposed upon hospitals, surgical centers and health care providers (subject to statutory exemptions) if they provide services in Minnesota. Under Minn.Stat. §§ 295.50-295.59 the receipts of hospitals, surgical centers and health care providers are taxable gross revenues if the receipts are for services provided in Minnesota, including any part of the receipts that

reflects services purchased by the hospitals, surgical centers and health care providers from medical reference laboratories located either inside or outside Minnesota.

9. During the Tax Periods, revenues derived from the MinnesotaCare tax were used to fund the MinnesotaCare program (Minn.Stat. Ch. 256L), other health care initiatives referenced in Minn.Stat. § 295.581, and other state programs covered by legislative appropriations from the Health Care Access Fund, and the only purpose of the tax was to raise revenues for those uses.

10. The State of Minnesota does not apply the MinnesotaCare tax to services provided by hospitals, surgical centers or health care providers if the services are furnished at a location outside Minnesota.

CONCLUSIONS OF LAW

1. The application of Minn.Stat. § 295.53, subd. 1(a)(4)-(5) to Appellant does not violate the Commerce Clause of the United States Constitution.

2. The Order of the Commissioner of Revenue dated June 12, 2003, is hereby affirmed.

IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY. THIS IS A FINAL ORDER. A STAY OF FIFTEEN DAYS IS HEREBY ORDERED.

Memorandum

Background

This case concerns the 1998-2001 ("Tax Periods") MinnesotaCare tax liabilities of Mayo Collaborative Services, Inc. ("Appellant"), which operates a medical reference laboratory business in Minnesota. The MinnesotaCare tax was imposed during those years at the rate of 1.5% upon the gross revenues of health care providers, including medical reference laboratories. An exclusion is allowed for amounts received from other health care providers to avoid the pyramid-

ing of tax liabilities. As construed by the Commissioner of Revenue ("Commissioner"), the exclusion does not apply to amounts received from providers located and performing services outside Minnesota.

On June 12, 2003, the Commissioner issued an Order ("Order") disallowing the exclusion from the amount he determined to represent non-Minnesota receipts paid from sources other than Medicare, medical assistance and government agency reimbursement. The basis for the amount disallowed was the Commissioner's computation of non-Minnesota receipts for the sample month of December 2001, which he determined to be 93.60%. As a result of the disallowance, the Order assessed additional tax liabilities against Appellant for the Tax Periods in the amount of $4,450,502, plus interest.

On August 7, 2003, Appellant filed its Notice of Appeal in the Minnesota Tax Court challenging the Order. The parties then stipulated to the facts and are now seeking judgment from the Tax Court.

Issue

The issue in this case is whether the denial of the Minn.Stat. § 295.53, subd. 1(a)(4)-(5) exclusion to amounts received by providers located and performing services outside Minnesota violates the Commerce Clause of the United States Constitution.

Facts

Appellant is a business corporation organized and existing under the laws of the State of Minnesota. Its place of business is located in Rochester, Minnesota. Appellant is engaged in the business of providing medical reference laboratory services to hospitals, surgical centers, health care providers, and individual patients. Appellant performs laboratory tests on samples submitted by its customers and reports the test results to the customers. The parties have stipulated that

by virtue of this work, Appellant is a "health care provider" as defined by statute and subject to the MinnesotaCare tax imposed by Minn.Stat. §§ 295.50-295.59.

In its tax returns for the Tax Periods, Appellant included at Line 1 (total amount received) the gross revenues received from all sources for its medical reference laboratory services. It excluded from those gross revenues at Line 7 (amount received from hospitals and other providers) the amounts received for its medical reference laboratory services from customers that are hospitals, surgical centers or health care providers located both within and outside of Minnesota. In his Order, the Commissioner disallowed that portion of the Line 7 exclusion that he determined to represent non-Minnesota receipts paid from sources other than Medicare, medical assistance, and government agency reimbursement. Since the Commissioner computed non-Minnesota receipts for the sample month of December 2001 to be 93.6% of the total receipts for that month, he disallowed 93.6% of the amount reported on Line 7 of each return that was paid from sources other than Medicare, medical assistance, and government agency reimbursement.

Appellant challenges neither the Commissioner's construction of the MinnesotaCare exclusion nor his computation of non-Minnesota receipts. Rather, Appellant contends that Minn.Stat. § 295.53, subd. 1(a)(4)-(5),[1] violates the

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[1] The statute states:

295.53. Exemptions; special rules

Subdivision 1. Exemptions. (a) The following payments are excluded from the gross revenues subject to the hospital, surgical center, or health care provider taxes under sections 295.50 to 295.59;

[Footnote continued on next page]

Commerce Clause of the United States Constitution[2] by denying the exclusion to receipts from Appellant's customers located outside Minnesota. Appellant argues that the Commerce Clause is violated because the distinction drawn by the tax statute between Minnesota and non-Minnesota receipts fails to satisfy the internal consistency test and facially dis-

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[Footnote continued from previous page]

...

(4) payments received from hospitals or surgical centers for goods and services on which liability for tax is imposed under section 295.52 or the source of funds for the payment is exempt under clause (1), (2), (7), (8), (10), (13), or (20);

(5) payments received from health care providers for goods and services on which liability for tax is imposed under this chapter or the source of funds for the payment is exempt under clause (1), (2), (7), (8), (10), (13) or (20)....

2 The Tax Court does not have original jurisdiction to decide constitutional issues. Thus, pursuant to Minn.Stat. § 271.01 et seq. and the Minnesota Supreme Court decisions in *Erie Mining Co. v. Commissioner of Revenue*, 343 N.W.2d 261 (Minn.1984), *In re McCannel*, 301 N.W.2d 138 (Minn.1980), and *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn.1980), the federal constitutional issues in this matter were transferred to the District Court for resolution by Order of this Court dated December 19, 2003, and on December 29, 2003, Ramsey County District Court Judge Thomas Mott issued an Order of Transfer to Tax Court, returning to the Tax Court for decision the portions of this case involving federal constitutional issues.

criminates against interstate commerce. The Commissioner contends that the exclusion created by Minn.Stat. § 295.53, subd. 1(a)(4)-(5) does not implicate the Commerce Clause because it does not substantially affect an identifiable interstate economic activity or market. Even if the Commerce Clause were at issue, the Commissioner claims that the provision does not violate it because it legitimately distinguishes between those Minnesota health care transactions that have already been subject to the MinnesotaCare tax and those that have not, without regard to geographic location. For the reasons set forth below, we find no violation of the Commerce Clause and affirm the Order.

Discussion

The Commerce Clause

The Commerce Clause of the United States Constitution provides that "the Congress shall have the Power ... to regulate Commerce with foreign Nations and among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Commerce Clause represents an affirmative grant of power to Congress, it has long been held to impliedly contain a negative command, commonly referred to as the 'dormant' Commerce Clause, that the states may not discriminate against or unduly burden interstate commerce." *Chapman v. Commissioner of Revenue*, 651 N.W.2d 825, 832 (Minn. 2002), citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Appellant brings its challenge to the MinnesotaCare tax solely under the dormant Commerce Clause. The definition of "commerce" is the same whether the affirmative or dormant Commerce Clause is implicated. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S.Ct. 1590, 1597, 137 L.Ed.2d 852 (1997).

The "dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300, 117 S.Ct. 811, 825, 136

L.Ed.2d 761 (1997). The economic protectionism condemned by the Commerce Clause "is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580, 106 S.Ct. 2080, 2085, 90 L.Ed.2d 552 (1986). Thus, the Court has "consistently ... held that the Commerce Clause ... precludes a state from mandating that its residents be given a preferred right of access ... to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338, 102 S.Ct. 1096, 1100, 71 L.Ed.2d 188 (1982). Accordingly, a state may neither burden the access of out-of-state users to state resources and services nor impose special fees on non-residents when they attempt to use local services. "That the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than a specific penalty on the activity itself, is of no moment." *Camps Newfound*, 520 U.S. at 576-79, 117 S.Ct. at 1598-99.

Implication of the Commerce Clause

The Minnesota Supreme Court has used a two-step inquiry when assessing whether the application of a challenged state tax unduly burdens interstate commerce. *Chapman*, 651 N.W.2d at 832. The Court first determines whether the challenged statute implicates the Commerce Clause, and if it does, the Court then must determine whether the statute violates the Commerce Clause. *Stelzner v. Commissioner of Revenue*, 621 N.W.2d 736, 740 (Minn.2001). "Because states have wide latitude in establishing their taxation schemes, and statutes will be declared unconstitutional only when absolutely necessary, [taxpayers] bear a heavy burden at each step of the inquiry." *Id.*

"It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or

impede its free flow." *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 389, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). To show that the MinnesotaCare exclusion implicates the Commerce Clause, Appellant must demonstrate the statute involves "(1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities having a substantial effect on interstate commerce." *Chapman*, 651 N.W.2d at 833, citing *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

Appellant relies upon the Chapman case as support for its position that the MinnesotaCare exclusion at issue implicates the Commerce Clause. In *Chapman*, the Minnesota Supreme Court held that the Commerce Clause was implicated by a statute that allowed a charitable deduction for contributions to Minnesota charities but not for contributions to non-Minnesota charities because "[p]ayments are things in interstate commerce and payments to parties across state lines require the use of the channels of interstate commerce. *Chapman*, 651 N.W.2d at 833. Because the present case involves the tax treatment of "payments to parties across state lines," Appellant claims that under the *Chapman* rationale, denial of a tax exclusion for the interstate payments at issue while allowing an exclusion under MinnesotaCare for similar intrastate payments implicates the Commerce Clause.

The Commissioner cites two cases decided by the Minnesota Supreme Court since 1999 to support his argument that the Commerce Clause is not implicated by the MinnesotaCare tax exclusion. In *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn.1999), *cert. denied* 528 U.S. 821, 120 S.Ct. 66, 145 L.Ed.2d 57, the taxpayer argued that application of Minnesota's non-domiciliary resident statute violated the Commerce Clause by burdening her right to interstate travel, but the Court disagreed. "Here, it is not Luther's movement across state lines that is being taxed.... The re-

quirement that she pay Minnesota income tax was triggered by conduct that took place wholly within Minnesota and that did not substantially affect interstate commerce." *Id.* at 511. Taxpayers in *Stelzner* challenged application of the same provision arguing that, due to their business activities, they were "major participants in a significant and competitive multi-state and international market, ..." *Stelzner*, 621 N.W.2d at 741. The Court rejected the taxpayers' claim because they had "not shown anything more than an incidental impact on their cost of doing business in interstate commerce." *Id.* Here, the Commissioner contends that since the exclusion applies to most of Appellant's Minnesota health provider customers because they have had the tax imposed on their transactions with patients or other providers, it directly implicates only the tax liability of medical reference laboratories located in Minnesota subject to Minnesota tax and has no direct impact on any interstate business or market. Further, he claims that the exclusion puts Minnesota labs at a competitive disadvantage by requiring them to pay the tax on services to out-of-state customers which would not be taxable if the customers dealt with a lab in a state that had not adopted a health care tax scheme. Because the tax arguably impairs the Minnesota lab's ability to compete with labs in states that do not tax health care services, the Commissioner argues there is no impact whatsoever on either a market or a market participant. As a result, the Commissioner concludes that the Commerce Clause is not implicated by the challenged exemption.

We agree with Appellant that *Chapman* is controlling in this case and that the MinnesotaCare exclusion does implicate the Commerce Clause. As in *Chapman*, the present case involves the tax treatment of "payments to parties across state lines." The Minnesota Supreme Court has held that "paying ... across state lines concern[s] things in interstate commerce and the channels of interstate commerce." *Chapman*, 651 N.W.2d at 833. The denial of a tax exclusion for

such interstate payments, while allowing an exclusion for similar intrastate payments, implicates the Commerce Clause.

The Commissioner argues that the Commerce Clause is not implicated by this case because the failure of the statute to exclude from the MinnesotaCare tax revenues derived from interstate sales of Minnesota labs does not adversely affect the ability of non-Minnesota labs to compete with Minnesota labs. Thus, the Commissioner contends that the exclusion does not affect interstate business or markets in any way relevant to the Commerce Clause. The Commissioner's unstated premise is that the Commerce Clause does not protect the pricing of goods and services sold by Minnesota merchants to their non-Minnesota customers from the impact of taxes directly or indirectly imposed upon the interstate transactions. The United States Supreme Court expressly rejected the argument that "the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers" in the *Camps Newfound* case, invalidating a tax statute that burdened camps serving nonresident campers. *Camps Newfound*, 520 U.S. at 578, n. 11. *See also Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240- 248, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (invalidating manufacturing tax that discriminated between in-state and out-of-state sales of in-state manufacturers).

Neither do the Minnesota authorities cited by the Commissioner support his position. Both Stelzner and Luther involved the power of the State to tax residents upon worldwide income. The Court held that this power did not implicate the Commerce Clause because it was predicated upon the taxpayers' substantial contacts with Minnesota rather than their use of the channels of interstate commerce or things in interstate commerce. The present case is different because it involves the taxation of revenues from interstate sales. Accordingly, we are not persuaded by the Commis-

sioner's arguments that application of the MinnesotaCare exclusion does not implicate the Commerce Clause.

Violation of the Commerce Clause

Because application of the statute implicates the Commerce Clause, we must next determine whether it violates the Commerce Clause. In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the United States Supreme Court adopted a four-part Commerce Clause test for the constitutionality of a state tax (the "*Complete Auto* test"):

> [A] state tax ... will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State.

Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 310-11, 114 S.Ct. 2268, 2276, 129 L.Ed.2d 244 (1994) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977)). Here, Appellant argues that the MinnesotaCare provision at issue does not satisfy the fair-apportionment and non-discrimination portions of the test, thus violating the Commerce Clause.

Internal Consistency Principle

To determine whether the fair-apportionment and non-discrimination portions of the *Complete Auto* test have been satisfied, the United States Supreme Court has applied an internal consistency test. The internal consistency test is described as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in

> question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175, 185, 115 S.Ct. 1331, 1338, 131 L.Ed.2d 261 (1995).

Appellant argues that the distinction drawn by the MinnesotaCare exclusion between Minnesota and non-Minnesota receipts fails the internal consistency test because "its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* Appellant contends that under the MinnesotaCare provision, Minnesota (and any other state that adopts a similar statute) will tax the value of any lab service if either (a) the lab is located in that state, regardless of the location of the customer, or (b) the customer is located in that state, regardless of the lab. If the lab and the customer are located in different states, each of which has adopted the statute, Appellant claims that the value of the lab service will be taxed in both states. As a result, Appellant maintains that the risk that the value of the lab service will be taxed twice, if either the lab or the customer is located in a state that has adopted the statute, violates the internal consistency test be-

cause the lab is not taxed in an intrastate transaction, while both lab and provider are taxed in an interstate transaction.

The Commissioner claims that the statute passes the internal consistency test because whether the purchase of Appellant's lab services take place with a Minnesota provider or a non-Minnesota provider, the MinnesotaCare tax is applied only once to the transaction. That is, the tax is collected before Appellant renders its services in the case of a Minnesota customer-provider so that Appellant excludes the already-taxed transactions from its revenues. In the case of a non-Minnesota customer-provider on which the tax is not imposed, Appellant itself collects the tax. In either case, the Commissioner argues that the tax adds no burden to interstate commerce that intrastate commerce does not also bear because the lab services Appellant renders in Minnesota are taxed only once. Because the same health care transaction or taxpayer is not taxed more than once, the Commissioner contends that the tax is not internally inconsistent.

Internal consistency is preserved only when "the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Commission*, 514 U.S. at 185. We find that the MinnesotaCare tax statutory exclusion meets this test. Appellant attempts to demonstrate that the MinnesotaCare tax, if imposed by every state, would result in more than 100% of its lab services being taxed to the detriment of interstate commerce. However, Appellant's analysis fails to consider the MinnesotaCare tax in its application to a single taxpayer, the Minnesota lab. Appellant theorizes that if two states adopted the tax and the lab and the customer-provider were located in different states, the customer-provider would be taxed on the patient payment in its state while the lab would be taxed on the customer-provider payment in its state. However, this example demonstrates that intrastate commerce is discriminated

against in the state which fails to provide a credit for lab services rendered and already taxed in another state, not that interstate commerce is bearing any additional tax burden. Moreover, neither state is taxing the same health care services or the same taxpayer on its revenues more than once. The state where the lab is located is taxing lab services rendered in that state whereas the state where the customer-provider and patient are located is taxing health care services rendered in that state, but in a different service transaction. Appellant has identified no case holding that a tax was internally inconsistent because it applied differently to two different taxpayers at different levels in the chain of distribution of goods or services. *See Tyler Pipe Indus.*; *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) (both cases involve a single taxpayer engaged in two separate activities). For these reasons, the MinnesotaCare tax exclusion does not violate the principle of internal consistency and is fairly apportioned under the *Complete Auto* test.

Facial Discrimination

In addition to satisfying the internal consistency test, the MinnesotaCare provision cannot facially discriminate against interstate commerce. State laws discriminating against interstate commerce on their face are "virtually per se invalid." *Camps Newfound*, 520 U.S. at 575. Appellant argues that the MinnesotaCare statute facially discriminates against interstate commerce because it denies an exclusion for payments received from non-Minnesota providers that is allowed for payments received from Minnesota providers. The Commissioner contends that the statute does not facially discriminate against interstate commerce because the exclusion is based upon whether liability for the tax is imposed on the payor, in order to avoid the imposition of multiple taxation on a transaction, rather than on the location of the payor or the interstate or intrastate character of the transaction. The Commissioner further argues that the MinnesotaCare exclusion is

premised upon Minnesota's authority to impose a tax on health care transactions occurring within its borders, with which it has a substantial nexus, coupled with a rational desire not to tax a series of related transactions more than one time. In response, Appellant argues that facial discrimination does not depend upon statutory locational references or statutory use of terms such as interstate or intrastate or legislative motivation. Rather, Appellant claims it can arise from the operation of any statutory language that potentially disfavors interstate commerce. Moreover, Appellant points out that the Commissioner's Order, computations and correspondence acknowledge the locational distinctions implicit in the MinnesotaCare provision by referring to "non-Minnesota receipts," "receipts from Minnesota entities," "outstate [sic] receipts," and "receipts from other states."

As noted, state laws discriminating against interstate commerce on their face are "virtually per se invalid." *Id.* Unlike the exclusion at issue in *Camps Newfound*, however, for purposes of determining whether a health care transaction is excludible from gross revenues under the state health care tax, the Minnesota Legislature has not disparately treated two classes based upon whether they serve residents or nonresidents. In other words, the MinnesotaCare tax exclusion does not create a tax subsidy for local laboratories. On its face, Minn.Stat. § 295.53, subd. 1(a)(4)-(5) does not discriminate against out-of-state health care providers. It instead provides an exclusion for those taxpayers subject to the MinnesotaCare tax whose customers have already paid the tax. While the exclusion from gross revenues of Appellant's transactions with many Minnesota hospitals, surgical centers, and health care providers has the effect of requiring it to collect tax largely on its transactions with out-of-state entities and individual patients since those entities and persons have not previously paid the tax, the statute does not contain a geographic-based distinction so as to amount to discrimination against interstate commerce under the Commerce Clause. In

this case, the Minnesota Legislature determined that it was advisable to impose a tax on health care transactions in Minnesota to fund the availability of health care to persons who might otherwise be unable to afford it, but that the tax should be limited to a single imposition on a health care transaction, regardless of how many health care providers might participate in the provision of taxable services. Under the law, all consumers of Minnesota health care services pay the same tax but only once, whether they are located in Minnesota or elsewhere.

The Court of Appeals of Ohio upheld a state statute that exempted from state "income" interest on obligations solely of Ohio governmental entities in *Shaper v. Tracy*, 97 Ohio App.3d 760, 647 N.E.2d 550 (Ohio Ct.App. 1994), *review denied*, 71 Ohio St.3d 1477, 645 N.E.2d 1257 (Ohio 1995). The taxpayer in Shaper was an Ohio resident who owned municipal bonds issued by non-Ohio entities. He claimed that the applicable Ohio statute violated the Commerce Clause "because it includes in adjusted gross income the 'interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state,' while exempting interest earned on bonds issued by Ohio and its subdivisions and authorities." *Id.* at 551. The *Shaper* court determined that the Commerce Clause was not offended by a state statute that directly assisted the state in fulfilling its core function of ensuring the health and welfare of its citizens, rather than implementing some form of economic protectionism. Similarly, the MinnesotaCare tax on health care transactions in Minnesota assists the state in funding health care for persons who might otherwise be unable to afford it, enabling the state to fulfill its core function of ensuring the health and welfare of its citizens. As the *Shaper* court reasoned, "[e]ach state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds." *Id.* at 553. Here, Minnesota has a readily apparent interest in taxing Minnesota medical

service activity, without regard to where the patient whose sample is sent to Minnesota for testing may be located. This is readily distinguishable from the cases upon which Appellant relies which dealt with the taxation of out-of-state medical providers who provided their services out-of-state to patients who were Minnesota residents.[3]

Because Minnesota law treats differently health care transactions that are in fact substantially different, without regard to geographic distinctions, the MinnesotaCare provision is not facially discriminatory under the dormant Commerce Clause. The exclusion here avoids taxing two closely-related transactions, both of which are occurring in Minnesota, more than once under the MinnesotaCare tax scheme.

Conclusion

Although it broadly protects commerce, the dormant Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44, 80 S.Ct. 813, 816,

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[3] Appellant cites *Baertsch v. Dept. of Revenue*, Ramsey Cty Dist. Ct. No. C7-93-2680, Sept. 15, 1994, and *MeritCare Hosp. v. Commissioner of Revenue*, Ramsey Cty Dist. Ct. No. C2-94-12818, Sept. 7, 1995, as support for its position that Minnesota does not possess the constitutional power to tax the out-of-state customers receiving any in-state services. However, these cases involved the application of the MinnesotaCare tax to out-of-state medical and hospital services provided for Minnesota residents. That is not the case here where Appellant is a health care provider located in Minnesota, and the services being taxed were provided in Minnesota.

4 L.Ed.2d 852 (1960) (citation omitted). "Because states have wide latitude in establishing their taxation schemes, and statutes will be declared unconstitutional only when absolutely necessary, [taxpayers] bear a heavy burden at each step of the inquiry." *Stelzner*, 621 N.W.2d at 740. In this case, Appellant has failed to meet that burden. While we find that the exclusion created by Minn.Stat. § 295.52, subd. 1(a)(4)-(5) implicates the Commerce Clause because it involves payments to parties across state lines, we conclude it does not violate that provision because it legitimately distinguishes between those Minnesota health care transactions that have already been subject to the MinnesotaCare tax and those that have not, without regard to geographic location.

For the foregoing reasons, we find the application of Minn.Stat. § 295.53, subd. 1(a)(4)-(5) to Appellant does not violate the Commerce Clause of the United States Constitution and affirm the Order.

APPENDIX C

STATE OF MINNESOTA
IN SUPREME COURT
A04-2190

Mayo Collaborative
Services, Inc.,

Relator,

vs.

Commissioner of Revenue,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Page 13 of the slip opinion filed on June 30, 2005, is hereby modified by the addition of a footnote after the citation "*Id.* at 732" at the end of the page. The text of the added footnote shall read as follows:

> We recognize that in *Fulton Corp. v. Faulkner*, where the "only issue" was whether a facially discriminatory tax was nevertheless constitutional as a "compensatory" tax, the Supreme Court held that *Darnell* and *Kidd* were "no longer good law under the Com-

merce Clause." *Fulton*, 516 U.S. at 333-34, 346. But we read this holding as distinguishing *Darnell* and *Kidd* for the constitutional standard that a state must satisfy to justify a facially discriminatory tax— strictest scrutiny" not "rational basis." *Id.* at 345-46. This distinction is not material to our analysis of whether the MinnesotaCare tax is facially discriminatory. Further, we cannot ignore that when the tax liability of a third-party is involved, the Court signaled in *Jefferson Lines* that *Darnell* remains relevant. *See Jefferson Lines*, 514 U.S. 192-93 n.6. Thus, when we view *Jefferson Lines* and *Fulton* together, we conclude that *Darnell* and *Kidd* remain relevant when, as here, a taxpayer's claim that a tax is facially discriminatory is premised on a third party's tax burden.

2. The attached slip opinion, amended as stated above, shall be substituted for the opinion filed June 30, 2005.

3. The petition for rehearing of Mayo Services, Inc., is in all other respects denied.

4. The motion of Mayo Collaborative Services, Inc., for leave to file a reply memorandum in support of its petition for rehearing is denied.

Denied: July 29, 2005

BY THE COURT:

/s/

Sam Hanson
Associate Justice

APPENDIX D

Minnesota Statutes (2005)

Chapter 295.

Companies Subject to Gross Earnings Taxes

Hospitals and Health Care Providers

295.50. Definitions

Subdivision 1. **Definitions.** For purposes of sections 295.50 to 295.59, the following terms have the meanings given.

Subd. 2. **Commissioner.** "Commissioner" is the commissioner of revenue.

Subd. 2a. **Delivered outside of Minnesota.** "Delivered outside of Minnesota" means property which the seller delivers to a common carrier for delivery outside Minnesota, places in the United States mail or parcel post directed to the purchaser outside Minnesota, or delivers to the purchaser outside Minnesota by means of the seller's own delivery vehicles, and which is not later returned to a point within Minnesota, except in the course of interstate commerce.

Subd. 3. **Gross revenues.** "Gross revenues" are total amounts received in money or otherwise by:

(1) a hospital for patient services;

(2) a surgical center for patient services;

(3) a health care provider, other than a staff model health carrier, for patient services;

(4) a wholesale drug distributor for sale or distribution of legend drugs that are delivered in Minnesota by the wholesale drug distributor, by common carrier, or by mail, unless the legend drugs are delivered to another wholesale drug distributor who sells legend drugs exclusively at wholesale. Legend drugs do not include nutritional products as defined in Minnesota Rules, part 9505.0325; and

(5) a staff model health plan company as gross premiums for enrollees, co-payments, deductibles, coinsurance, and fees for patient services.

Subd. 4. **Health care provider.** (a) "Health care provider" means:

(1) a person whose health care occupation is regulated or required to be regulated by the state of Minnesota furnishing any or all of the following goods or services directly to a patient or consumer: medical, surgical, optical, visual, dental, hearing, nursing services, drugs, laboratory, diagnostic or therapeutic services;

(2) a person who provides goods and services not listed in clause (1) that qualify for reimbursement under the medical assistance program provided under chapter 256B;

(3) a staff model health plan company;

(4) an ambulance service required to be licensed; or

(5) a person who sells or repairs hearing aids and related equipment or prescription eyewear.

(b) Health care provider does not include:

(1) hospitals; medical supplies distributors, except as specified under paragraph (a), clause (5); nursing homes licensed under chapter 144A or licensed in any other jurisdiction; pharmacies; surgical centers; bus and taxicab transportation, or any other providers of transportation services other than ambulance services required to be licensed; supervised living

facilities for persons with mental retardation or related conditions, licensed under Minnesota Rules, parts 4665.0100 to 4665.9900; residential care homes licensed under chapter 144B; board and lodging establishments providing only custodial services that are licensed under chapter 157 and registered under section 157.17 to provide supportive services or health supervision services; adult foster homes as defined in Minnesota Rules, part 9555.5105; day training and habilitation services for adults with mental retardation and related conditions as defined in section 252.41, subdivision 3; boarding care homes, as defined in Minnesota Rules, part 4655.0100; and adult day care centers as defined in Minnesota Rules, part 9555.9600;

(2) home health agencies as defined in Minnesota Rules, part 9505.0175, subpart 15; a person providing personal care services and supervision of personal care services as defined in Minnesota Rules, part 9505.0335; a person providing private duty nursing services as defined in Minnesota Rules, part 9505.0360; and home care providers required to be licensed under chapter 144A;

(3) a person who employs health care providers solely for the purpose of providing patient services to its employees; and

(4) an educational institution that employs health care providers solely for the purpose of providing patient services to its students if the institution does not receive fee for service payments or payments for extended coverage.

Subd. 5. Repealed by Laws 1993, c. 345, art. 13, § 24.

Subd. 6. **Home health care services.** "Home health care services" are services:

(1) defined under the state medical assistance program as home health agency services provided by a home health agency, personal care services and supervision of personal care services, private duty nursing services, and waivered

services or services by home care providers required to be licensed under chapter 144A; and

(2) provided at a recipient's residence, if the recipient does not live in a hospital, nursing facility, as defined in section 62A.46, subdivision 3, or intermediate care facility for persons with mental retardation as defined in section 256B.055, subdivision 12, paragraph (d).

Subd. 6a. **Hospice care services.** "Hospice care services" are services:

(1) as defined in Minnesota Rules, part 9505.0297; and

(2) provided at a recipient's residence, if the recipient does not live in a hospital, nursing facility as defined in section 62A.46, subdivision 3, or intermediate care facility for persons with mental retardation as defined in section 256B.055, subdivision 12, paragraph (d).

Subd. 7. **Hospital.** "Hospital" means a hospital licensed under chapter 144, or a hospital licensed by any other jurisdiction.

Subds. 8 to 9a. Repealed by Laws 1996, c. 471, art. 6, § 13, eff. April 13, 1996.

Subd. 9b. **Patient services.** (a) "Patient services" means inpatient and outpatient services and other goods and services provided by hospitals, surgical centers, or health care providers. They include the following health care goods and services provided to a patient or consumer:

(1) bed and board;

(2) nursing services and other related services;

(3) use of hospitals, surgical centers, or health care provider facilities;

(4) medical social services;

(5) drugs, biologicals, supplies, appliances, and equipment;

(6) other diagnostic or therapeutic items or services;

(7) medical or surgical services;

(8) items and services furnished to ambulatory patients not requiring emergency care; and

(9) emergency services.

(b) "Patient services" does not include:

(1) services provided to nursing homes licensed under chapter 144A;

(2) examinations for purposes of utilization reviews, insurance claims or eligibility, litigation, and employment, including reviews of medical records for those purposes;

(3) services provided to and by community residential mental health facilities licensed under Minnesota Rules, parts 9520.0500 to 9520.0690, and to and by residential treatment programs for children with severe emotional disturbance licensed or certified under chapter 245A;

(4) services provided to and by community support programs and family community support programs approved under Minnesota Rules, parts 9535.1700 to 9535.1760 or certified as mental health rehabilitative services under chapter 256B;

(5) services provided to and by community mental health centers as defined in section 245.62, subdivision 2;

(6) services provided to and by assisted living programs and congregate housing programs;

(7) hospice care services;

(8) home and community-based waivered services under sections 256B.0915, 256B.49, 256B.491, and 256B.501;

(9) targeted case management services under sections 256B.0621; 256B.0625, subdivisions 20, 20a, 33, and 44; and 256B.094; and

(10) services provided to the following: supervised living facilities for persc . with mental retardation or related conditions licensed under Minnesota Rules, parts 4665.0100 to 4665.9900; housing with services establishments required to be registered under chapter 144D; board and lodging establishments providing only custodial services that are licensed under chapter 157 and registered under section 157.17 to provide supportive services or health supervision services; adult foster homes as defined in Minnesota Rules, part 9555.5105; day training and habilitation services for adults with mental retardation and related conditions as defined in section 252.41, subdivision 3; boarding care homes as defined in Minnesota Rules, part 4655.0100; adult day care services as defined in section 245A.02, subdivision 2a; and home health agencies as defined in Minnesota Rules, part 9505.0175, subpart 15, or licensed under chapter 144A.

Subd. 9c. **Person.** "Person" means an individual, partnership, limited liability company, corporation, association, governmental unit or agency, or public or private organization of any kind.

Subd. 10. Repealed by Laws 1993, c. 345, art. 13, § 24.

Subd. 10a. **Pharmacy.** "Pharmacy" means a pharmacy required to be licensed under chapter 151, or a pharmacy required to be licensed by any other jurisdiction.

Subd. 10b. **Regional treatment center.** "Regional treatment center" means a regional center as defined in section 253B.02, subdivision 18, and named in sections 252.025, subdivision 1; 253.015, subdivision 1; 253.201; and 254.05.

Subds. 11 to 12a. Repealed by Laws 1996, c. 471, art. 6, § 13, eff. April 13, 1996.

Subd. 12b. **Staff model health plan company.** "Staff model health plan company" means a health plan company as defined in section 62Q.01, subdivision 4, which employs one

or more types of health care provider to deliver health care services to the health plan company's enrollees.

Subd. 13. **Surgical center.** "Surgical center" is an outpatient surgical center as defined in Minnesota Rules, chapter 4675, or a similar facility located in any other jurisdiction.

Subd. 14. **Wholesale drug distributor.** "Wholesale drug distributor" means a wholesale drug distributor required to be licensed under sections 151.42 to 151.51.

Subd. 15. **Legend drug.** "Legend drug" means a drug that is required by federal law to bear one of the following statements: "Caution: Federal law prohibits dispensing without prescription" or "Rx only".

295.51. Minimum contacts required for jurisdiction to tax gross revenue

Subdivision 1. **Business transactions in Minnesota.** A hospital, surgical center, or health care provider is subject to tax under sections 295.50 to 295.59 if it is "transacting business in Minnesota." A hospital, surgical center, or health care provider is transacting business in Minnesota if it maintains contacts with or presence in the state of Minnesota sufficient to permit taxation of gross revenues received for patient services under the United States Constitution.

Subd. 1a. **Nexus in Minnesota.** A wholesale drug distributor has nexus in Minnesota if its contacts with or presence in Minnesota is sufficient to satisfy the requirements of the United States Constitution.

Subd. 2. Repealed by Laws 1993, c. 345, art. 13, § 24.

295.52. Taxes imposed

Subdivision 1. **Hospital tax.** A tax is imposed on each hospital equal to two percent of its gross revenues.

Subd. 1a. **Surgical center tax.** A tax is imposed on each surgical center equal to two percent of its gross revenues.

Subd. 1b. Repealed by Laws 1997, c. 225, art. 3, § 23, par. (a); Laws 1997, c. 251, § 28.

Subd. 2. **Provider tax.** A tax is imposed on each health care provider equal to two percent of its gross revenues.

Subd. 3. **Wholesale drug distributor tax.** A tax is imposed on each wholesale drug distributor equal to two percent of its gross revenues.

Subd. 4. **Use tax; prescription drugs.** (a) A person that receives prescription drugs for resale or use in Minnesota, other than from a wholesale drug distributor that is subject to tax under subdivision 3, is subject to a tax equal to the price paid to the wholesale drug distributor multiplied by the tax percentage specified in this section. Liability for the tax is incurred when prescription drugs are received or delivered in Minnesota by the person.

(b) A person that receives prescription drugs for use in Minnesota from a nonresident pharmacy required to be registered under section 151.19 is subject to a tax equal to the price paid by the nonresident pharmacy to the wholesale drug distributor or the price received by the nonresident pharmacy, whichever is lower, multiplied by the tax percentage specified in this section. Liability for the tax is incurred when prescription drugs are received in Minnesota by the person.

Subd. 4a. **Tax collection.** A wholesale drug distributor with nexus in Minnesota, who is not subject to tax under subdivision 3, on all or a particular transaction or a nonresident pharmacy with nexus in Minnesota, is required to collect the tax imposed under subdivision 4, from the purchaser of the drugs and give the purchaser a receipt for the tax paid. The tax collected shall be remitted to the commissioner in the manner prescribed by section 295.55, subdivision 3.

Subd. 5. **Volunteer ambulance services.** Volunteer ambulance services are not subject to the tax under this section. For purposes of this requirement, "volunteer ambulance service" means an ambulance service in which all of the individuals whose primary responsibility is direct patient care meet the definition of volunteer under section 144E.001, subdivision 15. The ambulance service may employ administrative and support staff, and remain eligible for this exemption, if the primary responsibility of these staff is not direct patient care.

Subd. 6. **Hearing aids and prescription eyewear.** The tax liability of a person who meets the definition of a health care provider solely because the person sells or repairs hearing aids and related equipment or prescription eyewear is limited to the gross revenues received from the sale or repair of these items.

Subd. 7. **Tax reduction.** Notwithstanding subdivisions 1, 1a, 2, 3, and 4, the tax imposed under this section equals for calendar years 1998 to 2003, 1.5 percent of the gross revenues received on or after January 1, 1998, and before January 1, 2004.

295.53. Exemptions; special rules

Subdivision 1. **Exemptions.** (a) The following payments are excluded from the gross revenues subject to the hospital, surgical center, or health care provider taxes under sections 295.50 to 295.59:

(1) payments received for services provided under the Medicare program, including payments received from the government, and organizations governed by sections 1833 and 1876 of title XVIII of the federal Social Security Act, United States Code, title 42, section 1395, and enrollee deductibles, coinsurance, and co-payments, whether paid by the Medicare enrollee or by a Medicare supplemental coverage as defined

in section 62A.011, subdivision 3, clause (10), or by Medicaid payments under title XIX of the federal Social Security Act. Payments for services not covered by Medicare are taxable;

(2) payments received for home health care services;

(3) payments received from hospitals or surgical centers for goods and services on which liability for tax is imposed under section 295.52 or the source of funds for the payment is exempt under clause (1), (7), (10), or (14);

(4) payments received from health care providers for goods and services on which liability for tax is imposed under this chapter or the source of funds for the payment is exempt under clause (1), (7), (10), or (14);

(5) amounts paid for legend drugs, other than nutritional products, to a wholesale drug distributor who is subject to tax under section 295.52, subdivision 3, reduced by reimbursements received for legend drugs otherwise exempt under this chapter;

(6) payments received by a health care provider or the wholly owned subsidiary of a health care provider for care provided outside Minnesota;

(7) payments received from the chemical dependency fund under chapter 254B;

(8) payments received in the nature of charitable donations that are not designated for providing patient services to a specific individual or group;

(9) payments received for providing patient services incurred through a formal program of health care research conducted in conformity with federal regulations governing research on human subjects. Payments received from patients or from other persons paying on behalf of the patients are subject to tax;

(10) payments received from any governmental agency for services benefiting the public, not including payments made by the government in its capacity as an employer or insurer or payments made by the government for services provided under general assistance medical care, the MinnesotaCare program, or the medical assistance program governed by title XIX of the federal Social Security Act, United States Code, title 42, sections 1396 to 1396v;

(11) government payments received by the commissioner of human services for state-operated services;

(12) payments received by a health care provider for hearing aids and related equipment or prescription eyewear delivered outside of Minnesota;

(13) payments received by an educational institution from student tuition, student activity fees, health care service fees, government appropriations, donations, or grants, and for services identified in and provided under an individualized education plan as defined in section 256B.0625 or Code of Federal Regulations, chapter 34, section 300.340(a). Fee for service payments and payments for extended coverage are taxable; and

(14) payments received under the federal Employees Health Benefits Act, United States Code, title 5, section 8909(f), as amended by the Omnibus Reconciliation Act of 1990.

(b) Payments received by wholesale drug distributors for legend drugs sold directly to veterinarians or veterinary bulk purchasing organizations are excluded from the gross revenues subject to the wholesale drug distributor tax under sections 295.50 to 295.59.

Subd. 2. **Deductions for staff model health plan company.** In addition to the exemptions allowed under subdivision 1, a staff model health plan company may deduct from its gross revenues for the year:

(1) amounts paid to hospitals, surgical centers, and health care providers that are not employees of the staff model health plan company for services on which liability for the tax is imposed under section 295.52;

(2) net amounts added to reserves, to the extent that the amounts added do not cause total reserves to exceed 200 percent of the statutory net worth requirement, the calculation of which may be determined on a consolidated basis, taking into account the amounts held in reserve by affiliated staff model health plan companies;

(3) assessments for the comprehensive health insurance plan under section 62E.11; and

(4) amounts spent for administration as reported as total administration to the department of health in the statement of revenues, expenses, and net worth pursuant to section 62D.08, subdivision 3, clause (a).

Subd. 3. **Separate statement of tax.** A hospital, surgical center, or health care provider must not state the tax obligation under section 295.52 in a deceptive or misleading manner. It must not separately state tax obligations on bills provided to patients, consumers, or other payers when the amount received for the services or goods is not subject to tax.

Pharmacies that separately state the tax obligations on bills provided to consumers or to other payers who purchase legend drugs may state the tax obligation as the wholesale price of the legend drugs multiplied by the tax percentage specified in section 295.52. Pharmacies must not state the tax obligation based on the retail price.

Whenever the commissioner determines that a person has engaged in any act or practice constituting a violation of this subdivision, the commissioner may bring an action in the name of the state in the district court of the appropriate county to enjoin the act or practice and to enforce compliance

with this subdivision, or the commissioner may refer the matter to the attorney general or the county attorney of the appropriate county. Upon a proper showing, a permanent or temporary injunction, restraining order, or other appropriate relief must be granted.

Subd. 4. Expired January 1, 2000.

Subd. 4a. **Credit for research.** (a) In addition to the exemptions allowed under subdivision 1, a hospital or health care provider may claim an annual credit against the total amount of tax, if any, the hospital or health care provider owes for that calendar year under sections 295.50 to 295.57. The credit shall equal 2.5 percent of revenues for patient services used to fund expenditures for qualifying research conducted by an allowable research program. The amount of the credit shall not exceed the tax liability of the hospital or health care provider under sections 295.50 to 295.57.

(b) For purposes of this subdivision, the following requirements apply:

(1) expenditures must be for program costs of qualifying research conducted by an allowable research program;

(2) an allowable research program must be a formal program of medical and health care research conducted by an entity which is exempt under section 501(c)(3) of the Internal Revenue Code of 1986 or is owned and operated under authority of a governmental unit;

(3) qualifying research must:

(A) be approved in writing by the governing body of the hospital or health care provider which is taking the deduction under this subdivision;

(B) have as its purpose the development of new knowledge in basic or applied science relating to the diagnosis and treatment of conditions affecting the human body;

(C) be subject to review by individuals with expertise in the subject matter of the proposed study but who have no financial interest in the proposed study and are not involved in the conduct of the proposed study; and

(D) be subject to review and supervision by an institutional review board operating in conformity with federal regulations if the research involves human subjects or an institutional animal care and use committee operating in conformity with federal regulations if the research involves animal subjects. Research expenses are not exempt if the study is a routine evaluation of health care methods or products used in a particular setting conducted for the purpose of making a management decision. Costs of clinical research activities paid directly for the benefit of an individual patient are excluded from this exemption. Basic research in fields including biochemistry, molecular biology, and physiology are also included if such programs are subject to a peer review process.

(c) No credit shall be allowed under this subdivision for any revenue received by the hospital or health care provider in the form of a grant, gift, or otherwise, whether from a government or nongovernment source, on which the tax liability under section 295.52 is not imposed.

(d) The taxpayer shall apply for the credit under this section on the annual return under section 295.55, subdivision 5.

(e) Beginning September 1, 2001, if the actual or estimated amount paid under this section for the calendar year exceeds $2,500,000, the commissioner of finance shall determine the rate of the research credit for the following calendar year to the nearest one-half percent so that refunds paid under this section will most closely equal $2,500,000. The commissioner of finance shall publish in the State Register by October 1 of each year the rate of the credit for the following calendar year. A determination under this section is not subject to the rulemaking provisions of chapter 14.

Subd. 5. Repealed by Laws 1997, c. 225, art. 3, § 23, par. (a); Laws 1997, c. 251, § 28.

295.54. Credit for taxes paid

Subdivision 1. **Taxes paid to another state.** A hospital, surgical center, or health care provider that has paid taxes to another jurisdiction measured by gross revenues and is subject to tax under sections 295.52 to 295.59 on the same gross revenues is entitled to a credit for the tax legally due and paid to another jurisdiction to the extent of the lesser of (1) the tax actually paid to the other jurisdiction, or (2) the amount of tax imposed by Minnesota on the gross revenues subject to tax in the other taxing jurisdictions.

Subd. 2. **Pharmacy refund.** A pharmacy may claim an annual refund against the total amount of tax, if any, the pharmacy owes during that calendar year under section 295.52, subdivision 2. The refund shall equal the amount paid by the pharmacy to a wholesale drug distributor subject to tax under section 295.52, subdivision 3, for legend drugs delivered by the pharmacy outside of Minnesota, multiplied by the tax percentage specified in section 295.52. If the amount of the refund exceeds the tax liability of the pharmacy under section 295.52, subdivision 1b, the commissioner shall provide the pharmacy with a refund equal to the excess amount. Each qualifying pharmacy must apply for the refund on the annual return as provided under section 295.55, subdivision 5. The refund must be claimed within one year of the due date of the return. Interest on refunds paid under this subdivision will begin to accrue 60 days after the date a claim for refund is filed. For purposes of this subdivision, the date a claim is filed is the due date of the return or the date of the actual claim for refund, whichever is later.

Subd. 3. **Wholesale drug distributor credit.** A wholesale drug distributor who has paid taxes to another state or prov-

ince or territory of Canada measured by gross revenues or sales and is subject to tax under sections 295.52 to 295.59 on the same gross revenues or sales is entitled to a credit for the tax legally due and paid to another state or province or territory of Canada to the extent of the lesser of (1) the tax actually paid to the other state or province or territory of Canada or (2) the amount of tax imposed by Minnesota on the gross revenues or sales subject to tax in the other taxing jurisdictions.

295.55. Payment of tax

Subdivision 1. **Scope.** The provisions of this section apply to the taxes imposed under sections 295.50 to 295.58.

Subd. 2. **Estimated tax; hospitals; surgical centers.** (a) Each hospital or surgical center must make estimated payments of the taxes for the calendar year in monthly installments to the commissioner within 15 days after the end of the month.

(b) Estimated tax payments are not required of hospitals or surgical centers if: (1) the tax for the current calendar year is less than $500; or (2) the tax for the previous calendar year is less than $500, if the taxpayer had a tax liability and was doing business the entire year.

(c) Underpayment of estimated installments bear interest at the rate specified in section 270.75, from the due date of the payment until paid or until the due date of the annual return whichever comes first. An underpayment of an estimated installment is the difference between the amount paid and the lesser of (1) 90 percent of one-twelfth of the tax for the calendar year or (2) one-twelfth of the total tax for the previous calendar year if the taxpayer had a tax liability and was doing business the entire year.

Subd. 3. **Estimated tax; other taxpayers.** (a) Each taxpayer, other than a hospital or surgical center, must make estimated payments of the taxes for the calendar year in quarterly installments to the commissioner by April 15, July 15, October 15, and January 15 of the following calendar year.

(b) Estimated tax payments are not required if: (1) the tax for the current calendar year is less than $500; or (2) the tax for the previous calendar year is less than $500, if the taxpayer had a tax liability and was doing business the entire year.

(c) Underpayment of estimated installments bear interest at the rate specified in section 270.75, from the due date of the payment until paid or until the due date of the annual return whichever comes first. An underpayment of an estimated installment is the difference between the amount paid and the lesser of (1) 90 percent of one-quarter of the tax for the calendar year or (2) one-quarter of the total tax for the previous calendar year if the taxpayer had a tax liability and was doing business the entire year.

Subd. 4. **Electronic payments.** A taxpayer with an aggregate tax liability of $120,000 or more during a fiscal year ending June 30 must remit all liabilities by electronic means in the subsequent calendar year.

Subd. 5. **Annual return.** The taxpayer must file an annual return reconciling the estimated payments by March 15 of the following calendar year.

Subd. 6. **Form of returns.** The estimated payments and annual return must contain the information and be in the form prescribed by the commissioner.

Subd. 7. **Extensions for filing returns.** If good cause exists, the commissioner may extend the time for filing MinnesotaCare tax returns for not more than 60 days.

295.56. Transfer of accounts receivable

When a hospital or health care provider transfers, assigns, or sells accounts receivable to another person who is subject to tax under this chapter, liability for the tax on the accounts receivable is imposed on the transferee, assignee, or buyer of the accounts receivable. No liability for these accounts receivable is imposed on the transferor, assignor, or seller of the accounts receivable.

295.57. Collection and enforcement; refunds; rulemaking; application of other chapters; access to records; interest on overpayments

Subdivision 1. **Application of other chapters.** Unless specifically provided otherwise by sections 295.50 to 295.59, the enforcement, interest, appeal, criminal penalties, and refunds provisions in chapter 289A, civil penalty provisions applicable to withholding and sales taxes under section 289A.60, and collection and rulemaking provisions under chapter 270, apply to taxes imposed under sections 295.50 to 295.59.

Subd. 2. **Access to records.** For purposes of administering the taxes imposed by sections 295.50 to 295.59, the commissioner may access patients' records that contain billing or other financial information without prior consent from the patients. The data collected is classified as private or nonpublic data.

Subd. 3. **Interest on overpayments.** Interest must be paid on an overpayment refunded or credited to the taxpayer from the date of payment of the tax until the date the refund is paid or credited. For purposes of this subdivision, the date of payment is the due date of the return or the date of actual payment of the tax, whichever is later.

Subd. 4. **Sampling techniques.** The commissioner may use statistical or other sampling techniques consistent with generally accepted auditing standards in examining returns or records and making assessments.

Subd. 5. **Exemption for amounts paid for legend drugs.** If a hospital or health care provider cannot determine the actual cost or reimbursement of legend drugs under the exemption provided in section 295.53, subdivision 1, paragraph (a), clause (6), the following method must be used:

A hospital or health care provider must determine the amount paid for legend drugs used during the month or quarter and multiply that amount by a ratio, the numerator of which is the total amount received for taxable patient services, and the denominator of which is the total amount received for all patient services, including amounts exempt under section 295.53, subdivision 1. The result represents the allowable exemption for the monthly or quarterly cost of drugs.

295.58. Deposit of revenues and payment of refunds

The commissioner shall deposit all revenues, including penalties and interest, derived from the taxes imposed by sections 295.50 to 295.57 and from the insurance premiums tax imposed by section 297I.05, subdivision 5, on health maintenance organizations, community integrated service networks, and nonprofit health service plan corporations in the health care access fund. There is annually appropriated from the health care access fund to the commissioner of revenue the amount necessary to make refunds under this chapter.

295.59. Severability

If any section, subdivision, clause, or phrase of sections 295.50 to 295.582 is for any reason held to be unconstitutional or in violation of federal law, the decision shall not af-

fect the validity of the remaining portions of sections 295.50 to 295.582. The legislature declares that it would have passed sections 295.50 to 295.582 and each section, subdivision, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subdivisions, sentences, clauses, or phrases is declared unconstitutional.

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No. 05-684

In The

Supreme Court of the United States

MAYO COLLABORATIVE SERVICES, INC.,

Petitioner,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The MinnesotaCare tax is assessed on gross revenues from patient services furnished in Minnesota by certain Minnesota health care providers ("providers"), including medical reference laboratories. To avoid pyramiding of the tax on related health care transactions, receipts from other health care providers are excludible from a provider's taxable revenues if the paying entities provide patient services on which liability for the MinnesotaCare tax is already imposed. The effect of the exclusion is to require payment of the tax but one time on the services of multiple providers furnishing a health care service with respect to a particular patient. The tax also provides a credit, which prevents the potential imposition of multiple taxes where a transaction crosses state lines (e.g., an out-of-state customer who is subject to a similar tax on the same revenues in another state). Petitioner challenged the tax exclusion as discriminatory under the dormant Commerce Clause. The Minnesota Supreme Court rejected this claim holding that the tax scheme is not discriminatory. The question presented is whether this anti-pyramiding tax statute, which exempts payments from providers for services on which these providers are themselves liable for tax, and which further provides a credit that negates the potential for multiple taxation on an interstate transaction, violates the dormant Commerce Clause.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Commissioner of Revenue of the State of Minnesota respectfully requests that the Court deny the Petition for a Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion and judgment in this case. The Minnesota Supreme Court's opinion is reported at 698 N.W.2d 408 (Minn. 2005) and is reproduced in Petitioner's Appendix ("Pet. App.") A at 1a.

RELEVANT AUTHORITY INVOLVED

In addition to the authority referenced in the Petition, relevant provisions of the MinnesotaCare tax in effect during the tax years in issue are set out in Respondent's Appendix ("Resp. App.") A, *infra*, at 1a.[1]

STATEMENT OF THE CASE

1. This case was heard by the Minnesota Tax Court and on appeal by the Minnesota Supreme Court solely on stipulated facts. Pet. App. A at 2a, Pet. App. B at 32a. Factual statements and claims in the Petition which are not based on the stipulated facts are, therefore, outside the

[1] For reasons it does not explain, Petitioner has referred to and reproduced what is described as the "2005" Minnesota Statutes edition of the MinnesotaCare tax in its Appendix D, rather than the provisions that were in effect during the tax years in issue, 1998 through 2001. Pet. at 3 n.4. The official Minnesota Statutes are actually published in even-numbered years and are supplemented in odd-numbered years. References in this brief to the MinnesotaCare tax statute, like those in the Minnesota Supreme Court's opinion, are to the 2000 edition of Minnesota Statutes, which contains the provisions in effect during the four tax years in issue. Pet. App. A at 2a.

record of this case.[2] A summary of the agreed facts is provided below.

Petitioner Mayo Collaborative Services, Inc. ("Mayo") furnishes medical reference laboratory services at its facility located in Rochester, Minnesota. Resp. App. B at 25a-26a, Stip. ¶ 1.[3] Its business consists of performing tests on samples submitted by its customers, including hospitals, surgical centers, health care providers, and individual patients, and of reporting the test results to the customers. *Id.* Mayo does not perform the tests itself. Rather, it purchases them from third parties, principally from its affiliated corporation, Mayo Clinic Rochester. *Id.* Mayo's activities in Minnesota satisfy the definition of a "health care provider" within the meaning of Minn. Stat. § 295.50, subd. 4. *Id.* Consequently, Mayo is subject to the MinnesotaCare tax imposed on health care providers by Minn. Stat. §§ 295.50-295.59 (2000). *Id.*; Resp. App. A.

In its MinnesotaCare tax returns filed with Respondent Minnesota Commissioner of Revenue ("Commissioner") for the taxable periods 1998-2001 ("Tax Periods"), Mayo excluded from its reported gross revenues for its medical reference laboratory services amounts it received from all customers who are hospitals, surgical centers, and health care providers. Resp. App. B at 26a, Stip. ¶ 3. Upon

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[2] For example, Petitioner's various self-aggrandizing statements such as "other health-care institutions from around the country seek Mayo's expertise and state-of-the-art services" have no basis in the record. Pet. at 2, 20. Similarly, Petitioner's claim that in a "common scenario" Mayo's customers resell Mayo's services "for an amount that covers Mayo's fee *and also generates a profit for the institution*" is not based on the stipulated record. Pet. at 2 n.1 (emphasis added).

[3] The parties' Stipulation, reproduced in Respondent's Appendix B, is taken from Mayo's Supplemental Record, as filed with the Minnesota Supreme Court.

auditing Mayo's returns for the Tax Periods, the Commissioner issued an order that disallowed the portion of the exclusion determined to represent "non-Minnesota" receipts (other than receipts from Medicare, medical assistance, and government agency reimbursement). Resp. App. B at 27a, Stip. ¶ 4. Under the Commissioner's interpretation of the statute, the revenues of a medical reference laboratory received from hospitals, surgical centers, and health care providers are excludible from taxable revenues only if the paying entities provide services on which liability for the MinnesotaCare tax has already been imposed. Resp. App. B at 28a, Stip. ¶ 8; *see* Minn. Stat. § 295.53, subd. 1(a)(4)-(5), Resp. App. A at 10a. As liability for the tax is imposed on services provided in Minnesota (Resp. App. B at 28a-29a, Stip. ¶ 8), Mayo's receipts from hospitals, surgical centers, and health care providers who do not render services in Minnesota are not from entities on which liability for the MinnesotaCare tax has been imposed and, consequently, are not excludable from gross revenues under the statute.[4]

2. The MinnesotaCare tax was enacted by the Minnesota Legislature in 1992 to fund new and expansive legislation designed to address problems posed by the alarming number of Minnesota residents who lacked adequate health insurance in an era of rapidly rising

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[4] Contrary to Mayo's numerous assertions, the statutory exemption is not based on whether Mayo's customers are located within or without Minnesota. *E.g.*, Pet. at i, 3, 7 n.7, 16, 20. Rather, the exemption is similar to a resale exemption, in that it turns solely on whether tax is imposed on Mayo's customer's transaction. In cases where the customer's service is taxed – to avoid tax pyramiding – Mayo receipts are not subject to tax.

medical costs. Eric H. Chadwick, Comment, *Minnesota-Care: Workable Financing or Just Wishful Thinking?*, 19 Wm. Mitchell L. Rev. 961, 962 (1993) (discussing history and purpose of MinnesotaCare statutes). In enacting the legislation, the Minnesota Legislature adopted an extensive statement of legislative purpose:

> The legislature finds that the staggering growth in health care costs is having a devastating effect on the health and cost of living of Minnesota residents. The legislature further finds that the number of uninsured and underinsured residents is growing each year and that the cost of health care coverage for our insured residents is increasing annually at a rate that far exceeds the state's overall rate of inflation.
>
> The legislature further finds that it must enact immediate and intensive cost containment measures to limit the growth of health care expenditures, reform insurance practices, and finance a plan that offers access to affordable health care for our permanent residents by capturing dollars now lost to inefficiencies in Minnesota's health care system.
>
> The legislature further finds that controlling costs is essential to the maintenance of the many factors contributing to the quality of life in Minnesota: our environment, education system, safe communities, affordable housing, provision of food, economic vitality, purchasing power, and stable population.
>
> It is, therefore, the intent of the legislature to lay a new foundation for the delivery and financing of health care in Minnesota and to call this new foundation the MinnesotaCare Act.

Minn. Stat. § 62J.015 (2004).

Thus, the central legislative purpose of the new MinnesotaCare statutes was to fulfill the state's core function of ensuring the health and welfare of its citizens, rather than implementing some form of economic protectionism. To accomplish this goal, the Minnesota Legislature determined that it was advisable to impose a general tax on health care services in Minnesota to fund the availability of health care to persons who might otherwise be unable to afford it. But at the same time, the Legislature concluded that the tax should be limited to a single imposition on a Minnesota health care transaction, regardless of how many health care providers might participate in the provision of taxable services to a patient. The Legislature was determined to avoid pyramiding, which would have served to make the cost containment problem even worse. It is difficult to conceive of a legislative purpose more closely associated with Minnesota's interest in assuring the health and welfare of its populace than furnishing health care to those who lack the means to pay for it themselves. The funding mechanism for this legislative initiative was the MinnesotaCare tax.[5]

3. Mayo appealed the Commissioner's order to the Minnesota Tax Court, contending that the Commissioner erred under the statute, Minn. Stat. § 295.53, subd. 1(a)(4)-(5), in denying the exclusion to receipts from Mayo's customers located outside Minnesota and that, alternatively, the statute, as applied by the Commissioner,

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[5] The Petition refers to a 1994 Minnesota trial court decision, suggesting that the tax "immediately encountered constitutional difficulties." Pet. at 2 n.2. However, the case dealt solely with the "nexus" provisions of the tax, as applied to out-of-state persons providing health care services to Minnesota patients, and is irrelevant to the question presented in the Petition.

violates the Commerce Clause of the United States Constitution. Mayo abandoned its statutory claim prior to submitting the case to the tax court and challenged the Commissioner's order solely under the Commerce Clause, contending that the tax failed to satisfy "internal consistency" under the fair apportionment prong of the constitutional test announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and that the tax facially discriminated against interstate commerce. Pet. App. D at 37a-39a. The tax court held that the tax did not violate internal consistency (Pet. App. D at 44a-47a) and did not facially discriminate against interstate commerce (Pet. App. D at 47a-50a) and affirmed the assessment order.

4. Mayo then appealed by writ of certiorari to the Minnesota Supreme Court which affirmed the tax court's decision. Pet. App. A at 1a. On appeal, Mayo argued, in essence, that because its revenues from health care providers who were themselves required to pay the MinnesotaCare tax were exempt, the Commerce Clause required that Mayo's revenues from health-care providers who were not subject to tax also be exempt. Mayo reasserted both its fair apportionment and facial discrimination claims on appeal. As to the facial discrimination claim, the Commissioner argued in response that the exemption was not discriminatory "because, by its plain language, the exemption was based on whether the customer had already paid the tax, not on whether the customer was located out of state." Pet. App. A at 4a. The Minnesota Supreme Court stated the question presented for review as follows: "[W]hether the MinnesotaCare tax on the gross revenues of health-care providers transacting business in Minnesota violates the Commerce Clause of the United States Constitution because it allows an exemption for revenues received from other health-care providers who are also

subject to the MinnesotaCare tax." Pet. App. A at 1a-2a. The Minnesota Supreme Court rejected both Mayo's facial discrimination and fair apportionment claims.[6] As Mayo has now abandoned its fair apportionment claim,[7] this brief focuses solely on the facial discrimination claim asserted in the Petition.

With respect to Mayo's facial discrimination claim, the Minnesota Supreme Court began by noting that the claim rested on the third prong of the *Complete Auto* test for whether a state tax violates the Commerce Clause – that a tax may not discriminate against interstate commerce. Pet. App. A at 7a. Quoting from this Court's recent decision in *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. ___, 125 S. Ct. 2419, 2425 (2005), the Minnesota Court noted that Mayo bore the burden of providing "convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities." Pet. App. A at 7a. The Court further observed, quoting from *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996), that a state tax discriminates against interstate commerce if it taxes "more heavily" when a transaction or

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[6] Contrary to Mayo's description, the Minnesota Supreme Court did not reject Mayo's fair apportionment claim solely based on its construction of a "tax credit" provision. Pet. at 6. Rather, the Minnesota Court extensively analyzed Mayo's fair apportionment claim that the tax was not internally consistent and rejected it on its merits. Pet. App. A at 15a-24a. However, it clearly did hold, in the alternative, that "even if the MinnesotaCare tax scheme could be considered internally inconsistent . . . , any potential for unfair apportionment would be eliminated by the MinnesotaCare credit provision." *Id.* at 24a.

[7] Pet. at 7 n.7. Mayo's abandonment of this claim places it in the unusual posture of now having to contend that a tax which is fairly apportioned and internally consistent nevertheless facially discriminates against interstate commerce.